Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JULIE SCHUSTER,

Petitioner,

v.

ROBERT SILVERMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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123 pp

QUESTIONS PRESENTED

Under the International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601-11610, which implements the Hague Convention on the Civil Aspects of International Child Abduction (Convention), 19 I.L.M. 1501 (1980), a court shall order the return of a child that has been wrongfully removed or retained from the country of the child's "habitual residen[ce]" (Convention Art. 3(a)), unless (among other things) "the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views" (Convention Art. 13). In this case, petitioner and respondent, along with their children, moved briefly from the United States to Israel, after which respondent coercively prevented petitioner from returning with their children to the United States. Petitioner eventually brought her children back to the United States. The district court found that petitioner did not wrongfully retain the children here because the United States, not Israel, was their habitual residence. The district court also found that one of the children did not want to return to Israel. The court of appeals, applying a *de novo* standard of review and independently reweighing the evidence, ruled that Israel was the children's habitual residence and ordered them returned there.

The questions presented are:

1. Did the court of appeals err in applying a *de novo* rather than clear-error standard of review to the district court's determination that Israel was not the children's habitual residence?

2. Did the court of appeals err in ordering the children returned to Israel without allowing the district court to determine, under Article 13 of the Convention, whether the children objected to being returned and had attained an age and degree of maturity at which it is appropriate to take account of their views?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Julie Schuster respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.[1]

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-35a) is reported at 338 F.3d 886. The opinion of the court of appeals panel (Pet. App. 37a-45a), which was vacated for rehearing en banc, is reported at 312 F.3d 914. The opinion of the district court (Pet. App. 47a-67a) is not reported, but is found at 2002 WL 971808. An opinion of the district court on remand from the en banc court of appeals (Pet. App. 69a-75a) is not reported, but is found at 2003 WL 22076555.

[1] When this case was commenced in the district court, petitioner and respondent were still married, and petitioner went by her then-married name of Julie Hechter Silverman. The parties have since divorced, and petitioner has remarried and now goes by the name of Julie Schuster.

JURISDICTION

The judgment of the en banc court of appeals was entered on August 5, 2003. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND TREATY INVOLVED

Included in an appendix to this petition are pertinent provisions of the International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601-11610 (Pet. App. 77a-79a), and the Hague Convention on the Civil Aspects of International Child Abduction (Convention), T.I.A.S. No. 11,670, 19 I.L.M. 1501 (1980) (Pet. App. 81a-83a).

STATEMENT

1. The Hague Convention on the Civil Aspects of International Child Abduction was designed to address the jurisdictional problems that arise when one parent attempts to deprive another parent of his or her right to custody over their child by removing the child to another country. The basic principle of the Convention is that custody should be determined under the laws of the country where the child is "habitually resident." Convention Arts. 1, 3. To that end, the Convention generally provides that, if one parent unlawfully removes the child from its country of habitual residence or unlawfully retains the child in another country, a court or other authority should order the child returned to its habitual residence, and no court in any country other than the country of habitual residence should adjudicate custody. Convention Art. 12.

The Convention contains exceptions to the rule requiring return of children to their habitual residence. For example, a child need not be returned to its habitual residence if there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The child also need not be returned if the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. Convention Art. 13.

The United States is a party to the Hague Convention and has implemented it through the International Child Abduction Remedies Act (ICARA). ICARA provides a federal cause of action for an order directing the return of a child under the Convention upon a showing that the child was unlawfully removed or retained from its habitual residence, within the meaning of the Convention. 42 U.S.C. § 11603.

Much in the Convention and ICARA turns on which country is determined to be the child's habitual residence. If a child has been unlawfully removed to this country from its habitual residence elsewhere (or unlawfully retained here), then a court in this country is to order the child's return, and no court here may make a custody determination. On the other hand, if a court entertaining an ICARA petition finds that this country, and not another country, is the child's habitual residence, then there is no work under ICARA for the court to do; it may not order the return of a child to a different country that is *not* its habitual residence.

The principal issue in this case is how the federal courts of appeals should exercise appellate review over a federal district court's determination that a particular country is, or is not, the child's habitual residence. Should the court of appeals treat this decision essentially as a question of fact to be reviewed under the clearly-erroneous standard (in which case many parties probably would not appeal the district court's ruling, thus expediting the subsequent custody determination)? Or should it be treated as a principally legal question subject to *de novo* review (thereby encouraging parents to seek the opinion of a higher court)?

2. Petitioner Julie Schuster (formerly Julie Hechter Silverman) and respondent Robert Silverman were married from 1989 until 2001. Julie is originally from the United States; Robert is originally from South Africa. The two met in Israel in 1988 when they were both working at the Hyatt Hotel in Jerusalem. Shortly after they met, they settled in the United States where Robert pursued his studies. They lived in various places in this country, including Poughkeepsie, San Francisco, and Los Angeles, and eventually settled in Plymouth, Minnesota, in May 1995. It is undisputed that

they resided together in Minnesota, with their two children, Samuel and Jacob, for at least four years after that. Samuel was born in 1992; Jacob was born in 1995. Pet. App. 48a-49a.

By the late 1990s, the marriage encountered serious difficulties, and Julie and Robert sought marital counseling several times. Julie also began a relationship with another man, who is now her husband. Nevertheless, in 1997 and 1998, Julie and Robert discussed moving to Israel in an effort to save their marriage. In March 1999, they closed on the sale of their home in Minnesota, and in July 1999, the family left the United States for Israel. By that time, Julie no longer wanted to move to Israel, but Robert convinced her to make a final effort to reconcile their marriage. Almost immediately after their arrival in Israel, as early as August 1999, Julie told Robert that she wanted to return to the United States. Pet. App. 25a, 49a-50a.

In October 1999, Julie flew back to the United States to file the parties' joint petition for bankruptcy in Minnesota. Julie wanted to take the children with her to Minnesota, but Robert refused to allow her to do so. When Julie returned to Israel later that month, she learned that Robert had obtained a restraining order that prevented her from leaving Israel. Robert eventually cancelled the restraining order after the two agreed to try one more time to reconcile. Robert acknowledged, however, that he would not have allowed Julie to leave Israel with the children at any time from October 1999 to June 2000, and he placed the children's passports and birth certificates in a safe deposit box. Pet. App. 50a-51a & n.3.

Julie also testified, in evidence the district court credited, that Robert "engaged in threats, force, and coercion during this time which prevented her from leaving Israel." Pet. App. 51a. In particular, the district court found credible Julie's testimony that Robert "was physically violent towards her and that he threatened to take her children away from [her]." *Id.* at 57a. On one occasion, Robert and Julie "got into a violent argument" in an automobile. *Id.* at 57a n.10. While driving "at about 40-55 miles [per] hour," Robert "leaned over and opened the passenger side door

where Julie was seated." *Ibid.* Robert also slammed Julie against a stone wall in their apartment, and told her that he "would see her dead before he would see her divorced." *Ibid.*

In January 2000, Julie and Robert returned to Minnesota to complete their bankruptcy proceeding. (The children, who were in school in Israel, remained there with their paternal grandparents.) Both Julie and Robert attended the discharge hearing and stated under oath that their permanent address was Plymouth, Minnesota. In April 2000, Julie and Robert also signed and filed a joint United States tax return for 1999 in which they listed their address as Plymouth, Minnesota. Pet. App. 51a & n.4.

In June 2000, Julie left Israel with the children for a trip to the United States and Canada. Robert granted his consent to the children's leaving Israel, but at the airport, he threatened Julie. At that moment, Julie decided that she would not return to Israel. Pet. App. 51a.

3. In August 2000, Julie filed a petition in Minnesota state court for legal separation from Robert and for custody of their two children. Robert, who was served with the petition in Israel, moved to dismiss for lack of jurisdiction, contending that only courts in Israel would have authority to adjudicate such matters. In May 2001, the state court issued a final decree granting Julie full custody over the children. Rejecting Robert's jurisdictional arguments, the state court found that the parties' move to Israel in August 1999 was temporary, and that Julie and the children would have returned to Minnesota from Israel in October 1999 had they not been prevented from doing so by Robert. The court noted that in their October 1999 bankruptcy petition, Julie and Robert listed their permanent address as Plymouth, Minnesota. That order was not appealed. Pet. App. 52a.

Meanwhile, Robert filed a petition under ICARA in the United States District Court for the District of Minnesota, contending that Julie had wrongfully removed or retained

the children from their country of habitual residence (supposedly, Israel), and requesting an order directing the return of the children to Israel.[2] The district court dismissed his petition on abstention grounds, but the court of appeals reversed and remanded, holding that abstention does not apply in Hague Convention cases. Pet. App. 47a, 52a-53a.

Upon remand to a different judge, the district court held an evidentiary hearing at which Robert and Julie testified. The court also interviewed Samuel, then age ten, in chambers with counsel present, because Samuel had expressed a desire to remain in the United States. Pet. App. 48a, 53a.

After these proceedings, the district court found that "the habitual residence of Sam and Jacob never changed from the United States to Israel and therefore, Julie's retention of the children in the United States since June 2000 was not wrongful." Pet. App. 57a. In making that finding, the district court found guidance in a decision of the Ninth Circuit, *Mozes* v. *Mozes*, 239 F.3d 1067 (2001), which stressed that "the first step toward acquiring a new habitual residence is forming a settled intention to leave the one left behind." *Id.* at 1075. The district court also observed that, "although it is the child's habitual residence that is being determined, ' "the intention or purpose which has to be taken into account is that of the person or persons entitled to fix the place of the child's residence." ' " Pet. App. 56a (quoting

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[2] Robert also filed a petition under the Hague Convention in an Israeli court, seeking a determination that Julie had wrongfully retained the children. Pet. App. 53a. On November 16, 2000, the Israeli court concluded that Israel was the habitual residence of the children, as defined in the Hague Convention, and that Julie's failure to return them was *prima facie* evidence of her wrongful retention of the children. Robert has never argued in this proceeding, however, that the courts in this country should defer to these determinations by the Israeli court, either as a matter of full faith and credit or as a matter of comity. Nor did the court of appeals address this issue. Accordingly, any such argument has been waived.

Mozes, 239 F.3d at 1076 (in turn quoting E.M. Clive, *The Concept of Habitual Residence*, 1997 Jurid. Rev. 137, 144)).

Focusing on the parties' intent (or lack thereof) to change their residence from the United States to Israel, the district court found that (a) the time that Julie, Samuel, and Jacob would have spent in Israel "would have been much shorter had Julie not been prevented from leaving Israel with the children from October 1999 until June of 2000," Pet. App. 57a, and that (b) "Julie's residence in Israel from October [1999] to June [2000] was coerced and . . . she did not share a settled intent to make Israel the family's habitual residence," *id.* at 60a-61a. The court observed that "a coerced residence is not a settled intent to live there." *Id.* at 58a. It also noted evidence in the record "which calls into question the permanency of the move to Israel"—namely, the fact that Julie and Robert stated both in their bankruptcy petition filed in October 1999 and in bankruptcy court in January 2000 that they resided in Minnesota, and that they listed Minnesota as their residence on their 1999 tax forms filed in April 2000. *Id.* at 61a.

The district court also ruled that, even if Israel was the children's habitual residence, they should not be returned there in light of the exceptions to the return obligation set forth in Article 13 of the Convention. The court found clear and convincing evidence that returning the children to Israel would expose them to a grave risk of physical harm or otherwise place them in an intolerable situation because of the current unrest in Israel. Pet. App. 62a-67a. The court observed in particular that Samuel "objects to returning to Israel, in part because of the violence in the region," and stressed that Samuel "is mature enough and old enough to take consideration of his views" on the question whether there was an "intolerable situation" in Israel. *Id.* at 62a, 66a. Because the district court found this exception to apply, it did not expressly decide whether, by itself, Samuel's ex-

pressed opposition to returning to Israel would suffice to prevent his return.[3]

4. A divided panel of the court of appeals affirmed. The panel majority stated that the "children's habitual residence is solely a question of fact, and we therefore review the district court's holding for clear error." Pet. App. 40a. Under that standard of review, the panel upheld the district court's ruling that the children's habitual residence was the United States, not Israel. *Id.* at 40a-41a. Judge Beam dissented; he concluded that "[t]he determination of habitual residence is based on facts, but the conclusion is a legal determination." *Id.* at 41a. Applying a *de novo* standard of review, he would have found Israel to be the children's habitual residence. *Ibid.*

5. After rehearing en banc, the court of appeals reversed. The majority ruled that a district court's determination of a child's habitual residence under the Convention is "necessarily a determination subject to de novo appellate review." Pet. App. 14a. Applying that standard and weighing the evidence itself, the en banc court concluded that Israel had become the children's habitual residence. *Id.* at 15a-21a. The court therefore ordered the children's immediate return to Israel, without allowing consideration of the possibility that one or both of the children might object to being returned. *Id.* at 22a-23a. Four judges dissented. *Id.* at 23a-35a. One judge also concurred in part and dissented in part. *Id.* at 23a.

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[3] Under ICARA, which implements the Hague Convention, a court may decline to order the return of a child if it finds by clear and convincing evidence that returning the child would pose a grave risk of physical harm or otherwise place the child in an intolerable situation, as set forth in Article 13(b) of the Convention. *See* 42 U.S.C. § 11603(e)(2)(A). By comparison, the court need only find by a preponderance of evidence that the child objects to being returned and is sufficiently old and mature for its views to be heeded, as set forth elsewhere in Article 13. *See* 42 U.S.C. § 11603(e)(2)(B).

a. After reviewing and recharacterizing the historical facts of the parties' relationship,[4] the en banc court concluded that "habitual residence determinations raise mixed questions of fact and law and therefore should be reviewed de novo." Pet. App. 14a. Alternatively, the court suggested that habitual residence might be "an application of facts to a legal principle," or an "ultimate fact based upon the application of legal principles to subsidiary facts," *ibid.* (brackets and internal quotation marks omitted), also subject to *de novo* review. The court reasoned that an "objective standard" for habitual residence is necessary because "it is imperative that parents be able to assess the status of the law on habitual residence and wrongful removal and retention." *Ibid.*

The court noted that habitual residence is not defined in the Hague Convention or ICARA, and is distinct from domicile. Pet. App. 16a. It also observed that "[f]ederal courts are agreed that 'habitual residence' must encompass some form of 'settled purpose.' " *Id.* at 17a. But although the dis-

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[4] The en banc majority's evaluation of the historical facts in this case was considerably different from that of the district court, which of course had viewed the witnesses and had adjudged their credibility, finding Julie to be more credible than Robert. For example, purportedly without overturning the district court's factual finding that "there was physical violence against Julie by Robert," the majority stated that "Julie also engaged in physical violence towards Robert." Pet. App. 3a n.6. Neither the district court's findings nor the record permits such a conclusion. To the contrary, the record demonstrates that at most Julie engaged in self-defense against Robert's violence. As the dissenters observed, Julie testified that after Robert "started screaming at [her]" and "pushed [her] head against the window," Julie "flung back" and "hit his mouth, on this corner, and ... made him bleed." *Id.* at 26a. There is no other evidence of "physical violence" by Julie, whereas the district court *found* that Robert had abused Julie. *Id.* at 57a-58a. The en banc majority also gratuitously referred to the man who is now Julie's husband as her "paramour." *Id.* at 5a. Further, the court of appeals discounted the fact, on which the district court had relied, that the parties had jointly stated Minnesota to be their home in their bankruptcy proceedings and their tax returns. The court of appeals found those points to be nothing more than "interesting facts showing the lack of integrity of both parties." *Id.* at 18a n.18.

trict court had specifically found that the parties did not share a settled intent to change their habitual residence from the United States to Israel (*id.* at 60a-61a), the court of appeals, weighing the evidence itself, concluded that, at the time Julie removed the children from Israel, they were habitual residents of Israel. *Id.* at 21a.

In reaching that conclusion, the court disregarded the district court's findings that (a) Julie was prevented by a restraining order from leaving Israel from October to November 1999; (b) Robert prevented Julie from leaving Israel with the children from November 1999 to June 2000; and (c) Robert engaged in "alleged abuse" of Julie after October 1999 (abuse the district court found in fact had occurred). Pet. App. 17a-18a. Although the en banc court acknowledged that "[h]abitual residence is not established when the removing spouse is coerced involuntarily to move to or remain in another country," its *de novo* review of the record led it to discount the evidence of abuse because "there was no coercion in getting Julie to move to Israel, and there is no alleged abuse of the children." *Id.* at 20a. According to the court of appeals (and contrary to the district court's findings), "Julie intended to move permanently to Israel prior to the move and, upon arrival in July, she intended to make Israel her home." *Ibid.* Thus, according to the court of appeals, the district court's findings that Julie "was subjected to coercion and abuse beginning two months after her arrival" were irrelevant. *Id.* at 21a.

The court of appeals also overturned the district court's ruling that returning the children to Israel would expose them to a grave risk of harm. Pet. App. 21a-22a. Although the district court had found that Samuel had expressed a desire not to return to Israel, in part because of the unsettled situation there, and that Samuel was a very mature child (*id.* at 66a), the court of appeals did not remand the case to the district court for a determination under Article 13 of the Convention whether the children's views should be

taken into account. Rather, it directed the district court to enter an order returning the children to Israel. *Id.* at 23a.[5]

b. Four judges dissented. The dissenters would have upheld, under a clearly-erroneous standard of review, the district court's determination that the children's habitual residence had remained the United States. Pet. App. 24a, 27a-31a.

The dissenters noted that the majority's decision to apply *de novo* review to the district court's habitual residence determination is inconsistent with the Ninth Circuit's decision in *Mozes*, *supra*, which "clearly stands for the proposition that the intent of the parties to abandon a prior habitual residence is an issue of fact to be determined by the district court, to which we owe great deference." Pet. App. 27a. As the dissenters observed, *Mozes* stated that "the first question to be answered" in a Hague Convention case "is whether there was a settled intention to abandon the family's prior habitual residence," and that "this [is] a question of fact, to which [appellate courts] defer to the district court." *Id.* at 28a.

The dissenters stressed that the majority, improperly reweighing the evidence, "selectively emphasize[d] a few facts that might have led the district court to a contrary conclusion" and "glosse[d] over those [facts] that weaken its position." Pet. App. 30a. For example, the majority ignored evidence to the effect that "the family was only away from the United States for a short time (even shorter when one considers that ten of the eleven months Julie and the children spent there were under duress); they never bought real property while in Israel; and, perhaps most importantly, they maintained that Minnesota was their home in two sepa-

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[5] Judge Melloy, concurring in part and dissenting in part, would have remanded the case to the district court to determine under Article 13 whether the children objected to being returned to Israel and, if so, whether the children "ha[d] attained an age and degree of maturity for which it would be appropriate to take into consideration their views." Pet. App. 23a.

rate proceedings, both of which occurred while they were living in Israel." *Id.* at 30a-31a. "In light of the complete record," the dissenters concluded, "the district court was well within its discretion in finding that Robert did not carry his burden" of establishing that Israel was the children's habitual residence. *Id.* at 31a.

The dissenters also would have remanded the case to the district court to determine whether, even if Israel is the children's habitual residence, they nonetheless should not be returned there. Pet. App. 31a-34a. The dissenters noted that the district court had specifically found that Samuel objected to being returned to Israel, and that he is mature enough and old enough for the court to consider his views. *Id.* at 33a. They would have required the district court to consider exceptions to the return obligation under Article 13 for both children. *Id.* at 34a.

6. On remand, the district court, heeding the en banc court's instructions, ordered the return of the children to Israel. Pet. App. 74a-75a. Because the only custody order outstanding in either the United States or Israel is the Minnesota state court' s order awarding full custody to Julie, the district court directed that the children be returned in the company of their mother, and that this custody arrangement be maintained until an Israeli court orders otherwise. The district court also clarified that its order does not prevent the return of the children to the United States should an Israeli court so order or allow. *Id.* at 73a-74a. The lower courts and Justice Thomas denied a stay, and so Julie has accompanied the children to Israel. No Israeli court has entered any order changing the custody arrangement or preventing Julie or the children from leaving Israel. Thus, should this Court reverse the court of appeals, Julie will be free to return to the United States with the children.[6]

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[6] Because reversal of the court of appeals' decision would free Julie to return to the United States with her children, this case is not moot even though the children have been returned to Israel. Reversal would alter the status quo in Julie's favor. *See Fawcett* v. *McRoberts*, 326 F.3d

REASONS FOR GRANTING THE PETITION

The Eighth Circuit has ruled that a district court's determination of a child's habitual residence under the Hague Convention is subject to *de novo* review on appeal. That decision conflicts with a decision of the Ninth Circuit in *Mozes* v. *Mozes*, 239 F.3d 1067 (2001), which held that, at least where (as here) the habitual residence determination turns on whether or not the parents shared an intent to abandon their prior residence and to establish a new one, the district court's ruling is to be reviewed under the traditional, clearly-erroneous standard for appellate review of findings of fact. It also conflicts with decisions of other circuits which have observed that questions of historical fact are reviewed under the clearly-erroneous standard in Hague Convention cases, just as in other cases.

Moreover, the Eighth Circuit's decision is erroneous. While the habitual residence determination may involve the application of legal rules to factual settings—and the articulation of those legal rules would be subject to *de novo* review on appeal—habitual residence is best understood as a question of ultimate fact, similar to other questions of ultimate fact that appellate courts review under the clearly-erroneous rule. This understanding of habitual residence as a fundamentally factual issue is confirmed by background to the Hague Convention, authoritative commentary to the Convention, and judicial decisions in other contracting states. The Eighth Circuit's decision is also bad policy, because it provides an incentive to recalcitrant parents to draw out Hague Convention proceedings through appeals, where

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491, 494-497 (4th Cir. 2003) (analyzing mootness in Hague Convention cases where child has been returned to another country, and concluding that such cases are not moot; also noting that the "overwhelming majority" of other courts, with the exception of the Eleventh Circuit, agree with that position), *petition for cert. filed*, 72 U.S.L.W. 3148 (U.S. Aug. 08, 2003) (No. 03-261). Alternatively, the Court may wish to direct the parties to address mootness, as that issue is also a recurring one in Hague Convention cases. *See* No. 03-261 Pet. 27-30.

there is the utmost need for definitive and expeditious resolution.

A. The Eighth Circuit's Adoption Of *De Novo* Review Conflicts With Decisions Of Other Circuits

The Eighth Circuit broadly concluded that the habitual residence determination "is necessarily a determination subject to de novo appellate review." Pet. App. 14a. In reaching that conclusion, it reasoned that habitual residence "must contain an objective standard," for "it is imperative that parents be able to assess the status of the law on habitual residence and wrongful removal and retention." *Ibid.*

The court of appeals acknowledged that " 'habitual residence' must encompass some form of 'settled purpose' " on the part of the family members. *Id.* at 17a. Nonetheless, it rejected the district court's unambiguous factual finding that Julie never formed a settled intent to make Israel the family's habitual residence. *Id.* at 17a-21a. The court of appeals did *not* question, however, the district court's finding that Julie was subjected to coercion and abuse beginning two months after her arrival. Rather, it dismissed that finding as irrelevant. *Id.* at 20a-21a. Hence, the court of appeals held that the children's habitual residence had changed to Israel *within two months of arrival*, despite the district court's finding of no settled intent. *Id.* at 21a.

The court of appeals sought support for its application of *de novo* review in the Ninth Circuit's decision in *Mozes* v. *Mozes*. In fact, as the dissenters observed, *Mozes* supports the opposite position, for it takes a much more nuanced approach to the question of habitual residence, and it is clear that the Ninth Circuit would have applied the clearly-erroneous standard in a case like this one. Like the en banc majority in this case, the Ninth Circuit did remark on the importance of consistency of application of the concept of habitual residence, so that parents could find guidance in the law. 239 F.3d at 1072. But the Ninth Circuit also stressed at several points that "a determination of 'habitual residence' under the Convention is primarily factual," *id.* at 1073, and that it often turns on "subjective intent," *id.* at 1074. The

Ninth Circuit also noted, explicitly following the approach taken by British courts, that "the first step toward acquiring a new habitual residence is forming a settled intention to abandon the one left behind." *Id.* at 1075. And in discussing the very question at issue in this case—whether a family abandoned its prior habitual residence and adopted a new one—the *Mozes* court stated squarely: "Whether there is a settled intention to abandon a prior habitual residence is a question of fact as to which we defer to the district court." *Id.* at 1075-1076.

As the Ninth Circuit also observed in *Mozes*, although the Convention speaks of the habitual residence of the *child*, it is rarely the case that the child's settled purpose to abandon a prior habitual residence and adopt a new one can be controlling, since children "normally lack the material and psychological wherewithal to decide where they will reside." 239 F.3d at 1076. Thus the inquiry will normally focus on the intent of the parents—"the person or persons entitled to fix the place of the child's residence." *Ibid.* When, in litigation, the parents claim to disagree as to where the child's residence has been fixed, the district court "must determine from all available evidence" what their true intent was at the time. *Ibid.* What this means is that the habitual residence determination will often turn (as it does here) on nothing more nor less than the parties' intent—a quintessential question of fact subject to clearly-erroneous review on appeal. *See infra* pp. 16-21.

The Third Circuit has adopted essentially the same position as that of the Eighth Circuit—that a district court's habitual residence determination is subject to *de novo* review. *See Feder* v. *Evans-Feder*, 63 F.3d 217, 222 n.9 (1995). That decision elicited a forceful dissent from Judge Sarokin, who, like the dissenters in this case, concluded that the habitual residence question was essentially one of "ultimate fact" subject to clearly-erroneous review. *See id.* at 228-229. Moreover, even the Third Circuit majority acknowledged that the district court's findings of "historical or narrative facts" are controlling unless clearly erroneous, *id.* at 222 n.9, and that the analysis must include consideration of the "par-

ents' present, shared intentions regarding their child's presence," *id.* at 224. Other courts of appeals, in cases that did not directly implicate the standard of review of a habitual residence determination, have stated that the proper standard of appellate review in Hague Convention cases mirrors the standard for other civil cases: *de novo* for pure issues of law, clearly-erroneous for issues of historical fact. *See Blondin* v. *Dubois*, 238 F.3d 153, 158 (2d Cir. 2001); *Walsh* v. *Walsh*, 221 F.3d 204, 213 (1st Cir. 2000); *Lops* v. *Lops*, 140 F.3d 927, 935 (11th Cir. 1998); *Friederich* v. *Friederich*, 78 F.3d 1060, 1064 (6th Cir. 1996).[7]

This Court's resolution of the proper standard of review is urgently needed. The issue is mature for this Court's consideration; there are now dozens of reported cases under ICARA involving the Hague Convention, and several circuits have addressed the question of the standard of appellate review.[8] The question of habitual residence, moreover, must be decided in *every* Hague Convention case (even though it may not be contested in every case). Uncertainty over the proper standard of review harms the children at the center of these disputes by further delaying the resolution of their custody proceedings, to which the Hague Convention case is only a jurisdictional prelude. A clear understanding of the proper role of appellate courts in Hague Convention cases is therefore essential to the proper implementation of the Convention.

B. The Eighth Circuit's Decision Is Erroneous And Conflicts With Decisions Of This Court

1. As the decisions discussed above make clear, in many Hague Convention cases, the court's determination of a

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[7] Of course, in Hague Convention cases as elsewhere, "if the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly-erroneous standard." *Inwood Labs.* v. *Ives Labs.*, 456 U.S. 844, 855 n.15 (1982).

[8] District courts and state courts have also issued conflicting decisions as to whether habitual residence is an issue of fact or law. *See, e.g.*, *Feder*, 63 F.3d at 227 (Sarokin, J., dissenting) (citing cases).

child's habitual residence turns centrally on whether the parents jointly intended to abandon their prior residence and to adopt a new one. This is especially true in this case, because the district court found (and the court of appeals did not dispute) that very soon after they arrived in Israel, Robert began to coerce and abuse Julie after he realized that she wished to return to the United States with her children. Pet. App. 57a-58a, 60a-61a. Such coercion renders the question of Julie's intent in relocating to Israel even more crucial because, as the court of appeals recognized, "[h]abitual residence is not established when the removing spouse is coerced involuntarily to . . . remain in another country." Pet. App. 20a. In Hague Convention cases that turn on intent, it should be indisputable that the proper standard of appellate review is the clearly-erroneous rule prescribed by Federal Rule of Civil Procedure 52(a). Rule 52(a) states in pertinent part that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

"Treating issues of intent as factual matters for the trier of fact is commonplace." *Pullman-Standard* v. *Swint*, 456 U.S. 273, 288 (1982). In *Pullman-Standard*, this Court held that "an intent to discriminate on account of race . . . is a pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard. It is not a question of law and not a mixed question of law and fact." *Id.* at 287-288; *see also Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573-574 (1985); *Rogers* v. *Lodge*, 458 U.S. 613, 622-623 (1982). And even if, in some other circumstance, it might be useful to think of the habitual residence determination as involving either the "application of facts to a legal principle," or "the application of legal principles to subsidiary facts," as the en banc majority suggested (Pet. App. 14a), that could hardly support what the majority did in this case, which was to disregard the district court's crucial finding of fact on Julie's intent, discount the district court's specific finding that Julie had been coerced into remaining in Israel, and reweigh all the historical facts for itself. "Determining the weight and

the credibility of the evidence is the special province of the trier of fact." *Inwood Labs.* v. *Ives Labs.*, 456 U.S. 844, 856 (1982).

More generally, if, as we believe (and as Judge Sarokin explained in his *Feder* dissent), the issue of habitual residence is best understood as a question of "ultimate fact," then it is clear that the district court's habitual residence determination is subject only to clearly-erroneous review under Rule 52(a). A question of ultimate fact is still a question of *fact*, even if the district court must make numerous subsidiary and logically antecedent factual determinations before arriving at the ultimate issue of fact, and even if the district court is required to consider the totality of the circumstances. The en banc majority was therefore plainly wrong to state that a question of "ultimate fact" warrants *de novo* review. Pet. App. 14a. As this Court has made clear, Rule 52(a) "does not make exceptions" and "does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts." *Pullman-Standard*, 456 U.S. at 287.

Thus, for example, this Court has ruled that a district court's determination whether there has been "vote dilution" in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, is subject only to clearly-erroneous review—even though the existence of vote dilution is clearly an "ultimate finding," the decision requires the trial court to consider the "totality of the circumstances," and the trial court must apply legal standards to historical facts. *See Thornburg* v. *Gingles*, 478 U.S. 30, 77-79 (1986). Similarly, this Court has noted that the determination whether a transfer constitutes a "gift" under the Internal Revenue Code requires an examination of the donor's intent—in essence, asking "what the basic reason for his conduct was in fact." *Commissioner* v. *Duberstein*, 363 U.S. 278, 286 (1960). Because "[r]esolution of that issue determine[s] the ultimate issue of whether a gift had been made" (*Pullman-Standard*, 456 U.S. at 287), the Court held that the ultimate determination whether a transfer constitutes a gift is subject to clear-error review. *Duberstein*, 363 U.S. at 288-291.

2. In reasoning that *de novo* review was needed because habitual residence must contain an "objective standard," the en banc majority may have meant to draw on criminal and habeas cases from this Court, in which the Court has ruled that certain determinations affecting criminal defendants' constitutional rights are subject to *de novo* appellate review (if originally made by a federal district court) or are not entitled to a presumption of correctness on habeas review (if originally made by a state court).[9] A central theme of these cases, however, is that they do *not* turn on any particular individual's credibility or intent, but rather concern what a reasonable person in the defendant's or the police officer's position would have understood. *See Thompson* v. *Keohane*, 516 U.S. 99, 113-114 (1995). By contrast, when a trial court's decision turns on matters such as an individual's state of mind, intent, credibility, or impartiality, the determination is treated as one of fact.[10]

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[9] The en banc majority cited (Pet. App. 14a n.16) *Ornelas* v. *United States*, 517 U.S. 690 (1996) (standard of appellate review on whether probable cause justified warrantless car search). Other cases in this line include *Thompson* v. *Keohane*, 516 U.S. 99 (1995) (whether suspect was "in custody" for *Miranda* purposes) and *Miller* v. *Fenton*, 474 U.S. 104 (1985) (voluntariness of confession). But the need for an objective standard to govern out-of-court behavior is not sufficient by itself to result in application of *de novo* review; thus, a trier of fact's determination of negligence is generally reviewed on appeal only for clear error, despite the question of reasonableness inherent in the inquiry. *See Doggett* v. *United States*, 505 U.S. 647, 652 (1992); *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 402 (1990); *McAllister* v. *United States*, 348 U.S. 19, 20-22 (1954); 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2590 (1995).

[10] *See Wainwright* v. *Witt*, 469 U.S. 412, 429 (1985) (whether juror was properly struck because of her views on capital punishment); *Hernandez* v. *New York*, 500 U.S. 352, 364 (1991) (opinion of Kennedy, J.) (whether juror was struck for race-neutral reasons); *Patton* v. *Yount*, 467 U.S. 1025, 1036-1037 (1984) (whether juror was impartial); *Rushen* v. *Spain*, 464 U.S. 114, 120 (1983) (same); *Maggio* v. *Fulford*, 462 U.S. 111, 116-118 (1983) (whether defendant was competent to stand trial); *see also Marshall* v. *Lonberger*, 459 U.S. 422, 434 (1983) (stressing that reviewing courts should not second-guess credibility determinations).

These decisions make clear that the clear-error standard of review should govern the habitual residence determination in Hague Convention cases, which in the end will often turn on a decision as to which of two parents is telling the truth. In such a case, "[t]he trial judge is of course applying some kind of legal standard to what he sees and hears," but his decision is guided by "credibility findings whose basis cannot be easily discerned from an appellate record. These are the 'factual issues' that are subject to [deferential review]." *Wainwright* v. *Witt*, 469 U.S. 412, 429 (1985).

The application of clearly-erroneous review to a district court's habitual residence decision also mirrors the way in which the courts of appeals review district court rulings about a party's domicile. Although the two concepts are distinct, each requires an examination of the person's present location and intention to remain at that location. *See Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 48 (1989) ("[D]omicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there."); *Sun Printing & Publ'g Ass'n* v. *Edwards*, 194 U.S. 377, 383 (1904) ("[I]t is elementary that, to effect a change of one's legal domicil, two things are indispensable: First, residence in a new domicil; and second, the intention to remain there."). Of the ten courts of appeals that have considered the standard of review for district court rulings about a person's domicile, eight review such rulings only for clear error,[11] and two review for clear error

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[11] *See Coury* v. *Prot*, 85 F.3d 244, 251 (5th Cir. 1996); *Lundquist* v. *Precision Valley Aviation, Inc.*, 946 F.2d 8, 11 (1st Cir. 1991); *Galva Foundry Co.* v. *Heiden*, 924 F.2d 729, 729-730 (7th Cir. 1991); *Lew* v. *Moss*, 797 F.2d 747, 750 (9th Cir. 1986); *Dunlap* v. *Buchanan*, 741 F.2d 165, 167 (8th Cir. 1984); *Scoggins* v. *Pollock*, 727 F.3d 1025, 1027 (11th Cir. 1984); *Sligh* v. *Doe*, 596 F.2d 1169, 1171 (4th Cir. 1979); *see generally* 13B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3612 (1995). The Tenth Circuit also reviews a determination of domicile for clear error, *see State Farm Mutual Auto Insurance Co.* v. *Dyer*, 19 F.3d 514, 518 (10th Cir. 1994); *Rishell* v. *Jane Phillips Episcopal Mem. Med. Ctr.*, 12 F.3d 171, 173 (10th Cir. 1993); *Crowley* v. *Glaze*, 710 F.2d 676, 678

the question whether a change in residence was effected with the requisite intention to establish domicile.[12] There is no reason why the issue of habitual residence should be treated differently.

3. The court of appeals also overlooked an important systemic reason supporting the clearly-erroneous rule in cases like this one: the need for expedition. The Hague Convention was intended to establish a streamlined procedure for authorities to determine whether a child had been unlawfully removed or retained from the child's country of habitual residence, and if so, to order the child's prompt return. This emphasis on expedition is reflected in the text of the Convention itself, at Articles 11 and 12,[13] and in ICARA.[14]

To minimize disruption of the child's life, it is crucial that the question of habitual residence be settled quickly in any action brought under the Convention. If a court in this country determines that the United States is the child's habitual residence, then the court should promptly dismiss the action, so that the child can resume his or her normal life here without the fear of being taken to another land. Con-

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(10th Cir. 1983); *Leavitt* v. *Scott*, 338 F.2d 749, 751 (10th Cir. 1964), but on one occasion has reviewed it *de novo*, *see Aves* v. *Shah*, 997 F.2d 762, 766-767 (10th Cir. 1993).

[12] *See Palazzo ex rel. Delmage* v. *Corio*, 232 F.3d 38, 42-43 (2d Cir. 2000); *Krasnov* v. *Dinan*, 465 F.2d 1298, 1299-1300, 1302-1303 (3d Cir. 1972).

[13] Article 11 provides: "The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children." Article 12 provides: "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authorities where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith."

[14] "Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies." 42 U.S.C. § 11601(a)(4).

versely, if a court determines that another country is the child's habitual residence and the child was brought here wrongfully, then the child should be returned quickly so that the child's ties to his true home environment are not weakened.

De novo review, by encouraging appeals, postpones the ultimate resolution of the issue. A clearly-erroneous standard of review, by contrast, encourages parents to accept the decision of the district court and allow the child to get on with his or her life. *Cf. Cooter & Gell* v. *Hartmarx, Inc.*, 496 U.S. 384, 404 (1990) (abuse-of-discretion review of district court's Rule 11 rulings "will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court," and will "also discourage litigants from pursuing marginal appeals"); *In re Extradition of Howard*, 996 F.2d 1320, 1328 (1st Cir. 1993) (rejecting *de novo* review of magistrates' extraditability determinations in part because plenary review would "engender[] unwarranted delays in the extradition process").

Given "the exceptional need for finality in child-custody disputes," *Lehman* v. *Lycoming County Children's Services Agency*, 458 U.S. 502, 512 (1982), it is not surprising that most state appellate courts review child custody determinations only for clear error. *See* Jeff Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts*, 18 Fam. L.Q. 1, 40-41 (1984) (noting that 30 states review for clear error, while seven review *de novo*).[15] The need for finality is equally important if not more so in a Hague Convention case, which may be followed by subsequent litigation in the courts of the child's habitual residence to determine which parent will have custody.

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[15] At least one of those seven States has subsequently changed its standards to clear-error review. *See Fletcher* v. *Fletcher*, 526 N.W.2d 889 (Mich. 1994).

C. The Background Of The Hague Convention, Authoritative Commentary, And Foreign Decisions Treat Habitual Residence As Factual

When interpreting a treaty, this Court traditionally looks to the background of the treaty, post-ratification understandings, and the interpretations of courts of other countries that are also parties to the treaty. *See, e.g., Zicherman* v. *Korean Air Lines Co., Ltd.*, 516 U.S. 217, 226 (1996); *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 535 (1991); *Air France* v. *Saks*, 470 U.S. 392, 404 (1985). In this case, all three interpretative aids point towards a conclusion that habitual residence is a factual determination.

Habitual residence has been used in numerous international civil treaties promulgated under the Hague Conference on Private International Law, in part because of "the artificiality of the notion of domicile as applied to young children." A.V. Dicey & J.H.C. Morris, *The Conflict of Laws* 162 (12th ed. 1993). "No definition of habitual residence has ever been included in a Hague Convention; this has been a matter of deliberate policy, the aim being to leave the notion free from technical rules which can produce rigidity and inconsistencies as between different legal systems. In those contexts, the expression is not to be treated as a term of art but according to the ordinary and natural meaning of the two words it contains." *Ibid.*

In 1972, in the context of a resolution that attempted to standardize the definitions of residence and domicile, the Council of Europe resolved that "the concept of domicile imports a legal relationship between a person and a country governed by a particular system of law or a place within such a country," whereas "[t]he residence of a person is determined solely by factual criteria; it does not depend upon the legal entitlement to reside." Council of Europe Committee of Ministers' Resolution (72) 1, *On the Standardisation of the Legal Concepts of "Domicile" and of "Residence"* ¶ 1

(adopted Jan. 18, 1972).[16] The resolution further noted that "[i]n determining whether a residence is habitual, account is to be taken of the duration and the continuity of the residence as well as of other facts of a personal or professional nature which point to durable ties between a person and his residence." *Id.* ¶ 9. In determining whether residence is habitual, "a person's intentions may be taken into account." *Id.* ¶ 10.

The parties to the Hague Convention, which was drafted against this backdrop, explicitly chose habitual residence rather than domicile because a person's habitual residence is solely an issue of fact, without carrying any legal implication. The Explanatory Report by Elisa Pérez-Vera, the Official Reporter for the Convention, stated the understanding of the parties to the treaty that "habitual residence [is] a well-established concept in the Hague Conference, which regards it as question of pure fact, differing in that respect from domicile." Elisa Pérez-Vera, *Explanatory Report*, ¶ 66 (1981).[17] The Pérez-Vera Report has been accorded great weight by U.S. and foreign courts interpreting the Convention, and is "recognized by the [Hague] Conference [on Private International Law] as the official history and commentary on the convention and is a source of background on the meaning of the provisions of the Convention available to all states becoming parties to it." *Mozes*, 239 F.3d at 1070 n.3 (quoting U.S. Department of State, *Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 51 Fed. Reg. 10,503 (1986)); *see also Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (22-28 March 2001)*[18]

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[16] *Available at* http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Foreigners_and_citizens / Nationality / Documents / Legal_ instruments / 1_COE.asp

[17] *Available at* http://www.hcch.net/e/conventions/expl28e.html.

[18] *Available at* http://www.hcch.net/e/conventions/reports28e.html.

("The Special Commission emphasises the continuing importance as an aid to the interpretation and understanding of the Convention of the Explanatory Report by Elisa Pérez-Vera.").[19]

Accordingly, the courts of other contracting states interpret habitual residence as a question of fact. "[A]t the time of the drafting the possibility was very real that different interpretations might emerge within Contracting States," but "general adherence to the factual nature of the concept has meant that at present this has not happened to any large extent." Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention on International Child Abduction* 93 (1999). British courts have consistently held that the question of habitual residence "is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words which it contains." *In re J (A Minor) (Abduction: Custody Rights)*, [1990] 2 A.C. 562, 578. British courts, much like American courts, will find that habitual residence has changed only if "[a]n appreciable period of time" has elapsed and a "settled intention" exists to change residence. *Id.* at 578-579; *see also Re Bates*, [1989] No. CA 122/89, High Court of Justice, Fam. Div'l Ct., Royal Courts of Justice.[20] Accordingly, British courts evaluate habitual residence as "a question of fact to be decided by reference to all the circumstances of any particular case." *In re J*, 2 A.C. at 578; *see also Re M (Abduction: Habitual Residence)*, [1996] 1 FLR 887, 890-895. And because habitual residence is a "finding of

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[19] Treaties subsequently promulgated under the auspices of the Hague Conference on Private International Law continue to treat habitual residence as a question of fact. *See* Paul Lagarde, *Explanatory Report on the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children*, ¶ 41 (1997), *available at* http://www.hcch.net/e/conventions/expl34e.html (whether change in habitual residence has occurred is "question of fact which is for the authorities called upon to make a decision to assess").

[20] *Available at* http://www.hiltonhouse.com/cases/Bates_uk.txt

fact," British appellate courts will not reweigh the evidence but rather will apply a deferential standard of review. *In re S (A Minor)*, [1998] A.C. 750, 762.

Other jurisdictions apply similar standards. In Australia, the determination of habitual residence is a "question of fact" with "two elements—the fact of residence, and the intention to reside habitually." *State Central Authority and McCall*, [1995] 121 FLR 65, 70, 1994 WL 1658367; *see also Laing* v. *Central Authority*, [1996] 135 FLR 68, 85, 1996 WL 1747438; *In Marriage of Brandon*, [1990] 100 FLR 124, 131, 1990 WL 1034700. Australian courts apply a deferential standard in reviewing determinations of habitual residence by courts of first instance. *See Laing*, 135 FLR at 82; *In Marriage of Hanbury-Brown*, [1996] 130 FLR 252, 288, 1996 WL 1745894. Similarly, the High Court of New Zealand has held that "there is ample authority to show that the construction of the phrase 'habitual residence' has no particular legal magic"; rather, the term must "be construed in the ordinary meaning of the words." *Hayward and Hayward* [1995] AP No. 359/94; [21] *see also S.* v. *O.D.*, [1995] District Court Hamilton FP 019/675/94[22] (habitual residence is "a question of fact to be decided by reference to all the circumstances of any particular case"); *Secretary for Justice* v. *D.*, [1994] District Court of New Zealand at Auckland[23] (determination of habitual residence, unlike determination of custodial rights, "relies on findings of facts").

Canadian appellate courts have followed the British courts and have held that habitual residence is a "question of fact to be decided by reference to all the circumstances of the case." *Chan* v. *Chow*, 90 B.C.L.R. (3d) 222 ¶ 32 (British Columbia Court of Appeal 2001); *see also B. (J.)* c. *D. (Y.)*, 1996 CarswellQue 2140 ¶ 64 (Québec Court of Appeal 1996) ("la «résidence habituelle» doit être comprise comme une

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[21] *Available at* http://www.hiltonhouse.com/cases/Hayward_nz.txt (second case on page).

[22] *Available at* http://www.hcch.net/incadat/fullcase/0250.htm

[23] *Available at* http://www.hcch.net/incadat/fullcase/0251.htm

notion de pur fait"). Following British courts and American courts, the British Columbia Court of Appeal has held that habitual residence "is established by residing in a place for an appreciable period of time, with a 'settled intention.' " *Chan*, 90 B.C.L.R. (3d) 222 ¶ 32.

In passing ICARA, Congress stressed "the need for uniform international interpretation of the Convention." 42 U.S.C. § 11601(b)(3)(B). Because foreign courts, in accordance with traditional international interpretations of the term, and in accordance with the views expressed by the Official Reporter of the Convention, treat habitual residence as a factual question, this Court should resolve any uncertainty about the standard and ensure that American courts interpret the term in conformity with the interpretation of other contracting states.

D. Even If Israel Was The Children's Habitual Residence, The Court Of Appeals Should Have Remanded For Proceedings Under Article 13 Of The Convention

Finally, even if the court of appeals acted properly in reviewing the district court's habitual residence determination under a *de novo* standard and reversing, it nonetheless erred in directing that the children be returned to Israel. The ultimate (unnumbered) paragraph of Article 13 of the Convention provides that a child need not be returned to his habitual residence "if the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." ICARA provides that this exception to the return obligation need only be established by a preponderance of the evidence. *See* 42 U.S.C. § 11603(e)(2)(B). Whether a child objects to being returned, and whether the child is old enough and mature enough for his views to be taken into account, are clearly factual issues within the province of the district court. *See Blondin*, 238 F.3d at 166-167. Accordingly, the district court should have had the opportunity in this case to resolve these factual questions before the children were returned, and the court of appeals should have remanded the case to the district

court to make these determinations, rather than pretermitting all these issues by ordering the children to be returned.

In fact, the district court had already found that Samuel objected to being returned to Israel (Pet. App. 66a) and was old enough (then age ten) and mature enough for his views to be taken into consideration, yet the court of appeals accorded those findings no significance. *Id.* at 21a-22a. The district court had not yet made a finding either way for Jacob. The district court did not need to make such a finding for Jacob, because it concluded, under a separate exception to the return obligation in Article 13b (whether there was a grave risk that return would expose the children to physical harm), that neither Samuel nor Jacob should be returned. The court of appeals reversed that determination, concluding that the situation in Israel was not sufficiently dangerous to preclude the children's return. *Id.* at 22a. But the court of appeals left undisturbed the district court's finding that Samuel was old enough and mature enough for his views to be taken into account. Accordingly, on remand, the district court should have been allowed to determine whether Samuel's objections to being returned should be heeded, and it also should have been allowed to make similar findings about Jacob. In its haste to deprecate Julie's case and the district court's careful decisionmaking, the court of appeals erred in cutting off these important proceedings on remand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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OCTOBER 2003

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

ROBERT HECHTER SILVERMAN,
Appellant,

v.

JULIE HECHTER SILVERMAN,
Appellee.

No. 02-2496

Submitted: April 16, 2003
Filed: Aug. 5, 2003

[338 F.3d 886]

Before LOKEN, Chief Judge, HEANEY, McMILLIAN, BOWMAN, WOLLMAN, BEAM, MORRIS SHEPPARD ARNOLD, MURPHY, BYE, RILEY, MELLOY, SMITH, Circuit Judges.[1]

BEAM, Circuit Judge, with whom LOKEN, Chief Judge, BOWMAN, WOLLMAN, MORRIS SHEPPARD ARNOLD, RILEY and SMITH, Circuit Judges, join.

Robert Silverman (Robert) appeals the district court's rulings on his claim under the Hague Convention on the

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[1] Circuit Judges Murphy and McMillian were not present at oral arguments and participated in this decision utilizing the parties' briefs and a tape recording of the oral arguments. Circuit Judge Heaney participated via telephone.

Civil Aspects of International Child Abduction (Hague Convention), 19 I.L.M. 1501 (1980), as implemented by the United States in the International Child Abduction Remedies Act, 42 U.S.C. § 11601-11610 (ICARA). Because we find that the children's habitual residence was Israel at the time of their removal and that there is no grave risk of harm to the children if they are returned to Israel, we reverse the district court.

I. *BACKGROUND*

According to the facts found by the district court, Robert Silverman and Julie Hechter (Julie) met in Israel in 1988 and married in Seattle, Washington, in 1989. They moved throughout the United States and had two children, Sam and Jacob.[2] The family lived in Plymouth, Minnesota, until their move to Israel in late July of 1999.[3] Both Robert and Julie testified in the district court that the move to Israel was Julie's idea and that she was the one pushing for the family to make the move. They sold their Minnesota home in January of 1999, Robert applied for and made Aliyah (immigration) to Israel,[4] and the family moved all of their possessions and their family pets to Israel. While both Robert and Julie set the move up to be permanent, Julie stated in the district court that she was torn about the move, but went ahead with it as a final effort to reconcile the couple's failing marriage.[5]

Both Robert and Julie obtained employment in Israel. The family lived with relatives [890] in Israel until November 1999, when they rented an apartment and signed a one-

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[2] Sam was born on March 2, 1992, and Jacob was born on July 5, 1995.

[3] In the months leading up to the move, Robert worked and lived in Wisconsin, while Julie and the children remained in Minnesota.

[4] Julie had already made Aliyah in 1987.

[5] Julie testified that she was "torn," not because she did not want to go to Israel, but because she was not sure she wanted to stay in her marriage.

year lease. In October 1999, Julie flew to the United States to file for bankruptcy in Minnesota. Julie returned to Israel later that month to discover that Robert had obtained a Tzav Ikuv (restraining order), which prevented her from leaving Israel, and that he had put the children's passports and birth certificates in his father's safe deposit box. Robert told her at this point that he knew about the affair she had been having with a man from Massachusetts. Robert cancelled the restraining order on November 3, 1999, after they decided to try to reconcile their marriage. Robert testified in the district court that he would not have allowed Julie to leave Israel *with the children* at any point between October 1999 and June 2000. During this time, Julie stated that Robert threatened her, used force against her and attempted to coerce her.[6] In January 2000, Julie and Robert returned to Minnesota without the children to complete bankruptcy proceedings and they both stated, under oath, that their permanent address was Plymouth, Minnesota. Both of them subsequently returned to Israel. In April 2000, Robert and Julie signed and filed a joint United States income tax form for 1999, which listed their address as Plymouth, Minnesota.

While in Israel, Sam enrolled in an elementary school and Jacob enrolled in preschool. They made friends, learned to speak Hebrew and did well in school. Sam participated in extracurricular activities at his school. During this time, Julie counseled with an Israeli attorney and was told she would probably not get custody of the children through the Israeli Rabbinical court if she separated from Robert in Israel.[7] Robert found out about this discussion and filed for

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[6] The district court did not find, and Julie does not allege, that Robert committed any violence against the children. While we do not find it necessary to overturn the factual finding by the district court that there was physical violence against Julie by Robert, we do find it prudent to note that Julie also engaged in physical violence towards Robert.

[7] Apparently the attorney thought Julie would have a better chance in Israel civil court. Whether this was because of Julie's continuing adul-

divorce in Rabbinical court. He later cancelled this proceeding.

At the end of June 2000, Robert allowed Julie to leave Israel with the two children for what she represented would be a summer trip to the United States. She purchased round-trip tickets with the return trip scheduled for August 30, 2000. At the airport before their departure, Robert threatened Julie, apparently because of his continuing concern that she would not return to Israel with the children, a fear soon realized. She testified that it was at that moment at the airport that she decided not to return to Israel. Julie filed for legal separation from Robert and for custody of the two children in Minnesota state court on August 10, 2000. Robert was served summons in Israel. Robert immediately moved for dismissal of the action, arguing that the state court lacked authority to hear the custody issues because there had not yet been the necessary determinations of "wrongful removal and retention" and "habitual residence" as mandated by the Hague Convention and ICARA, determinations designed to establish whether Israel or the United States had jurisdiction to hear a child custody case.[8]

[891] The record reveals that on August 24, 2000, fourteen days after Julie's Minnesota action had been commenced, Robert filed in Israel a "Request for Return of Abducted Children" with the National Center for Missing and Exploited Children (NCMEC), pursuant to the Hague Convention. On September 22, 2000, a NCMEC agent contacted Robert's Israeli attorney and requested that the attorney obtain a determination from the Israeli courts as to whether

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terous relationship with the man from Massachusetts or for other unrelated reasons is not clear from the record.

[8] Article 16 of the Hague Convention provides that proceedings in an abducted-to nation, here the United States, may not determine custody issues. Hague Convention Article 16; 42 U.S.C. § 11601(b)(4); *March v. Levine*, 249 F.3d 462, 468 (6th Cir.2001). The Convention imposes and requires a *preliminary* determination of which country has jurisdiction to consider custody questions.

Julie had wrongfully removed or retained the children within the meaning of the Hague Convention. Some time shortly thereafter, Robert filed a Hague Convention petition in Israel seeking such a determination. In addition to filing the Israeli action, Robert filed a Hague petition on October 5, 2000, in the United States District Court for the District of Minnesota seeking return of the children to Israel under the Convention. Julie was personally served summons in this matter on October 10, 2000.[9] This filing and service preceded any determinations in the state custody matter. Indeed, it preceded the final order of the Minnesota trial court by almost seven months.

On October 17, 2000, although on notice of Robert's Hague filings,[10] a state court referee issued an interlocutory administrative order granting Julie temporary custody of the children. Armed with this temporary order, Julie testified that in February 2001 she decided to move with the two children to Massachusetts to live with her paramour. They subsequently moved.

Within a month after the October 17, 2000, temporary order, upon the request of Julie, the district court dismissed the federal Hague claims on abstention grounds, *Silverman v. Silverman*, No. 00-2274 (D.Minn. Nov. 13, 2000), but we reversed and remanded the case for an evidentiary hearing, finding that abstention does not apply in Hague Convention cases. *Silverman v. Silverman*, 267 F.3d 788, 792 (8th Cir.2001). On November 16, 2000, while both the state custody and federal Hague matters were pending in various courts in the United States, the Israeli court ruled that Israel was the place of habitual residence of Sam and Jacob as defined in the Convention and that Julie's failure to return

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[9] Julie was served the day of the state court hearing.

[10] "A court may get notice of a wrongful removal or retention in some manner other than the filing of a petition for return, for instance ... from the aggrieved party (either directly or through counsel) ...." 51 Fed.Reg. 10494(III)(H) (Mar. 26, 1986).

them to Israel was prima facie evidence of wrongful retention of the children in violation of the Convention.[11] A copy of this decision was furnished to the Israel Central Authority created by Articles 6 and 7 of the Hague Convention for use in the United States under the terms of Article 15 of the Convention.[12] On May 4, [892] 2001, the Minnesota trial court entered a final judgment awarding full child custody to Julie, child support from Robert and attorney fees to Julie. While this order specifically stated that the court was on notice of pending Hague Convention litigation, the court decided the custody issues anyway, applying only Minnesota law. The state court determined neither the "habitual residence" of the children nor the issue of "wrongful removal or retention" as required by and defined in the Hague Convention and ICARA. Indeed, it was not asked to do so. The

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[11] Although this determination was apparently made without her presence, Julie and her American attorney had been given notice of the Israeli petition and hearing but she decided not to attend. On December 21, 2000, Julie retained a lawyer in Israel and requested that the court reverse its November 16 decision. The Israeli judge agreed to hold a second hearing. Julie was also notified of this hearing, but was advised by her attorney not to attend. On October 30, 2001, the Israeli court refused to reverse its November 16, 2000, holding that Israel was the habitual residence of the children and that Julie had wrongfully removed them in violation of the Hague Convention.

[12] The Hague Convention provides that "[a] Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities." Art. 6. The Central Authorities of each Contracting State must cooperate with each other and with the competent authorities in their respective states to secure the prompt return of abducted children. In particular, the Central Authority shall take all appropriate measures,

> (a) to discover the whereabouts of a child who has been wrongfully removed or retained;
>
> ...
>
> (i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

See Hague Convention, Article 7. *See also* 22 C.F.R. § 94.6. *Egervary v. Young*, 159 F.Supp.2d 132, 138-39 (E.D.Pa.2001).

court, in awarding Julie custody and child support, found that Minnesota was the children's "home state" as referenced in Minnesota Statutes § 518D.102. In section 518D.102(h), "home state" is defined as "the state in which a child lived with a parent ... for at least six consecutive months immediately before the commencement of a child custody proceeding.... A period of temporary absence ... is part of the period." But, "state" is defined in the statute and includes only the fifty states, District of Columbia, Puerto Rico, Virgin Islands, and other United States territories and possessions. Thus, a determination of "home state" under the Minnesota statute is clearly not equivalent to a determination of "habitual residence" under the Hague Convention because under the Minnesota act, Israel could not have been determined to be the "home state" of the children.

No appeal was taken from the May 4, 2001, judgment but after the October 17, 2000, interlocutory order, Robert, on October 27, 2000, sought a writ of prohibition from the Minnesota Court of Appeals to restrain the implementation of the temporary ruling. Before this request was heard, however, the federal district court entered its abstention and dismissal order of November 13, 2000, an order later reversed by this court, as earlier noted. Without reviewing the Minnesota trial court order on the merits or considering any issues of federal law, including Hague Convention issues, the Minnesota Court of Appeals, using the federal court dismissal as a basis, denied the application for writ of prohibition as moot, indicating specifically that Robert was free to file a Hague petition in Hennepin County (Minnesota) Court. *Silverman v. Silverman*, Order C2-00-1879 (Minn.Ct.App., Nov. 21, 2000). So, to date, neither Robert nor Julie has ever requested any Minnesota court to make any Hague Convention or ICARA determinations and no such determinations have been made by any state tribunal.

On May 9, 2002, the federal district court ruled in favor of Julie on Robert's Hague Convention claim, finding that

Minnesota was the "habitual residence" of the children[13] and, alternatively, that even [893] if Israel was their habitual residence, that there was a grave risk in returning the children to Israel under the Article 13(b) exception to the Convention. *Silverman v. Silverman*, No. 00-2274, 2002 WL 971808 (D.Minn. May 9, 2002). Robert appeals this decision.

II. *DISCUSSION*

A. *Rooker-Feldman Doctrine*

At the outset, we address the relevance and applicability of the *Rooker-Feldman* doctrine to the claims in this case, an issue not raised by either party but by the court itself at oral argument, and now advanced for the first time by Julie in this appeal. More specifically, the *Rooker-Feldman* question is whether the state court judgment of May 4, 2001, divested the lower federal courts of subject matter jurisdiction to consider and review the Hague Convention and ICARA controversies raised by Robert in the federal district court. We find the doctrine inapplicable.

The *Rooker-Feldman* doctrine holds that the inferior federal courts lack jurisdiction to review a state court's final judicial determination. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416, 44 S.Ct. 149, 68 L.Ed. 362 (1923). "Under the legislation of Congress, no court of the United States other than [the Supreme] court [can] entertain a proceeding to reverse or modify the [state court] judgment ...." *Rooker*, 263 U.S. at 416, 44 S.Ct. 149; *see* 28 U.S.C. § 1257. However, applying such a simply stated rule has proven to be both complex and

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[13] The court found that the habitual residence of the children had never changed to Israel, but remained in Minnesota the entire time. The law is clear that wrongful removal from a country does not change a child's Hague Convention habitual residence. *Feder v. Evans-Feder*, 63 F.3d 217, 222 (3d Cir.1995). Therefore, if the children's habitual residence changed when they moved to Israel, it did not change back when Julie removed them back to Minnesota.

difficult. This is because the doctrine, in practice, has become a fluid mix of appellate subject matter jurisdiction, claim and issue preclusion, and, perhaps, abstention concepts. It has been extended not only to straightforward review of state court judgments, but also to "indirect attempts by federal plaintiffs to undermine state court decisions." *Lemonds v. St. Louis County*, 222 F.3d 488, 492 (8th Cir.2000). In determining whether *Rooker-Feldman* applies in a particular case, a federal court must determine whether the claim before it is "inextricably intertwined" with the claim already decided in the state court. *Id.* at 492-93. "A claim brought in federal court is inextricably intertwined with a state court judgment 'if the federal claim succeeds only to the extent that the state court wrongly decided the issue before it.' " *Ballinger v. Culotta*, 322 F.3d 546, 549 (8th Cir. 2003), (quoting *Lemonds*, 222 F.3d at 493.) "Where the district court must hold that the state court was wrong in order to find in favor of the plaintiff, the issues ... are inextricably intertwined." *Doe & Assocs. Law Offices v. Napolitano*, 252 F.3d 1026, 1030 (9th Cir. 2001).

According to several commentators, *Rooker-Feldman* analysis is influenced, in part, by the supremacy clause, full faith and credit concepts and congressional concerns for comity with and respect for the rights of the sovereign states. *See* U.S. Const. art. VI, § 1, cl. 2 & art. IV, § 1. The subject matter jurisdiction of the "inferior courts" of the United States is assigned through and limited by acts of Congress. *Id.* at art. III, §§ 1 & 2. Acting upon this Constitutional power,

> the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for [ ] strict construction .... Due regard for the rightful independence of state governments, **[894]** which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits ... the statute has defined.

Breuer v. Jim's Concrete of Brevard, Inc., --- U.S. ----, ----, 123 S.Ct. 1882, 1886, 155 L.Ed.2d 923 (2003) (some altera-

tions in original) (internal quotations omitted). *Rooker* and *Feldman* noted that Congress, in applying this policy, has limited federal subject matter jurisdiction over issues of direct review of state court decisions to the Supreme Court. *Rooker*, 263 U.S. at 416, 44 S.Ct. 149 (citing Judicial Code, § 237, as amended September 6, 1916); *Feldman*, 460 U.S. at 464, 103 S.Ct. 1303 (citing 28 U.S.C. § 1257). This does not mean, and the *Rooker-Feldman* decisions do not hold, that Congress has prohibited federal appellate courts from reviewing matters decided by federal district courts under specific grants of original jurisdiction, even when concurrent grants of original jurisdiction lie with both the state and federal courts in particular situations. *See* 28 U.S.C. § 1291.

Congress adopted the Hague Convention, an international treaty, making it, under the Constitution, part of "the supreme Law of the Land." U.S. Const. art. VI, § 1, cl. 2; *Asakura v. City of Seattle*, 265 U.S. 332, 341, 44 S.Ct. 515, 68 L.Ed. 1041 (1924). Congress then implemented the Hague treaty by enactment of ICARA. While ICARA grants original concurrent jurisdiction of *actions arising under the Convention* to the courts of the states and the United States, 42 U.S.C. § 11603(a), several restrictions in the treaty and ICARA guide these grants of jurisdiction in both sovereigns' courts. First, full faith and credit shall be accorded a prior judgment in either state or federal court, but only if the judgment arises through adjudication of a Hague Convention claim in accordance with the dictates of the Convention and ICARA. 42 U.S.C. § 11603(g); *see, e.g.*, *Holder v. Holder*, 305 F.3d 854, 864 (9th Cir.2002). As earlier noted, neither Robert nor Julie has ever requested any Minnesota court to make Hague Convention or ICARA determinations, and no state court has done so. Thus, the May 4, 2001, order of the Minnesota court is not entitled to full faith and credit under section 11603(g), and the *Rooker-Feldman* doctrine does not override federal statutory grants of original jurisdiction under ICARA or this court's appellate jurisdiction under section 1291.

In *Holder*, the Ninth Circuit addressed this issue in only a slightly different context. No ICARA action was *pending* when a California state court rendered a child custody determination, arguably, according to the state court plaintiff, eliminating the need for a Hague proceeding. The Ninth Circuit disagreed, noting correctly that "[i]t would [ ] undermine the very scheme created by the Hague Convention and ICARA to hold that a Hague Convention claim is barred [in federal district court] by a state court *custody* determination." 305 F.3d at 865 (emphasis in original). Indeed, Article 16 of the Convention states,

> [a]fter receiving notice of a wrongful removal ... the judicial ... authorities of the Contracting State to which the child has been removed or in which it has been retained [the United States] shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice [by the state court].

Further, as noted in footnote 8, Article 16 of the Hague Convention precludes a determination of custody in an abducted-to [**895**] nation, here the United States, unless and until Israel is determined not to be the habitual residence of the children in a Hague proceeding brought under ICARA.

In *Mozes v. Mozes*, 239 F.3d 1067, 1085 n. 55 (9th Cir.2001), upon facts very similar to those in this case, Judge Kozinski noted that,

> the [federal] district court would not be barred by the *Rooker-Feldman* doctrine from vacating the [California] Superior Court's custodial decree .... Because the doctrine is one of congressional intent, not constitutional mandate, it follows that where Congress has specifically granted jurisdiction to the federal courts, the doctrine does not apply.

We agree. Julie's late-blooming argument that a state court custody decision can somehow trump clearly granted

federal court jurisdiction to decide and review issues of congressionally adopted policy and procedure is simply untenable. The *Rooker-Feldman* doctrine has no application under the circumstances of this case.

Even if Julie had sought Hague Convention relief under ICARA in state court, *Rooker-Feldman* would be inapposite. A final state court order arising under the congressionally assigned subject matter would, of course, deserve full faith and credit under section 11603(g) of ICARA and, perhaps, if necessary, issue and claim preclusion protections under federal common law theories of res judicata and collateral estoppel. However, *Rooker-Feldman* jurisdictional limitations would be neither necessary nor applicable.

Assuming that the *Rooker-Feldman* doctrine was somehow applicable to this case, the doctrine would strip away federal jurisdiction only if the issues in the state and federal cases were the same or "inextricably intertwined." *Lemonds*, 222 F.3d at 492-93. The question would be whether the federal district court was called upon to review the same or similar issues as those decided by the state court at an earlier time. But, the district court did not purport to review the merits of the state custody decision or, even, the jurisdiction of the state court to make a child custody decision applying state law. Thus, there was no intertwinement. More specifically, the Minnesota decisions--the referee's temporary order, the trial judge's final order and the Minnesota Court of Appeals judgment--dealt only with divorce, child custody, child support and, perhaps, peripheral and limited procedural and interstate (not international) jurisdictional issues.[11] On the other hand, the district court made no determinations whatsoever on the merits of the

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[11] In *Cerit v. Cerit*, 188 F.Supp.2d 1239 (D.Haw.2002), the father petitioned the state court for a Hague Convention determination, and then subsequently petitioned the federal district court for the same ruling. The district court abstained on *Younger and Colorado River* abstention grounds. *Id.* at 1244-45.

separation, custody, or support and, as noted earlier, it would have been inappropriate for it to do so in a Hague Convention case. The sole decision made by the district court was whether Julie "wrongfully removed and retained" the children from their "habitual residence" in violation of the Hague treaty as adopted by ICARA. Accordingly, the district court was in no way stripped of its jurisdiction to make these determinations by even the most broad-ranging view of *Rooker-Feldman*.[15]

Finally, it is also probable that the state judgment of May 4, 2001, is of dubious [896] validity for reasons other than the district court action. This is so because the November 16, 2000, Israeli court order, finding both habitual residence of the children in Israel and wrongful removal of the children from Israel, was enforceable in the United States under the treaty and ICARA. The Israeli order directed the filing of a copy of the order with the Central Agency of Israel for use in the United States under Article 15 of the treaty. Upon such a finding and filing, Article 16 of the Convention specifically precluded Minnesota from determining custody issues involving these children.

B. *Standard of Review*

Having determined that the district court had jurisdiction to decide the Hague Convention issues, we now consider which standard of review we should apply in this appeal. Both parties agree that the "grave risk of harm" determination should be reviewed de novo. The conflict arises regarding the standard of review for the district court's habitual residence determination.

This court has not yet articulated a standard of review for habitual residence determinations under the Hague Convention. Julie and the dissent argue that the habitual residence determination is one of fact, to be reviewed for clear

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[15] Our jurisdiction to hear this appeal would not be affected by *Rooker-Feldman* unless the district court's jurisdiction was affected.

error. We disagree, being more persuaded by the Ninth and Third Circuits, which have determined that habitual residence determinations raise mixed questions of fact and law and therefore should be reviewed de novo. *Mozes*, 239 F.3d at 1073; *Feder v. Evans-Feder*, 63 F.3d 217, 222 n. 9 (3d Cir.1995) ("[T]he determination of habitual residence is not purely factual, but requires the application of a legal standard ... to historical and narrative facts. It is, therefore, a conclusion of law or at least a determination of a mixed question of law and fact.").

We recognize that a habitual residence determination must be based on facts and that the facts will vary considerably in each situation. But a district court's determination of habitual residence is not devoid of legal principles. It is not a question of pure fact, to be decided without reference to statutory language and established legal precedent. It must contain an objective standard. Whether "habitual residence" is labeled an application of facts to a legal principle, analogous to a probable cause determination,[16] or an "ultimate fact[ ] based upon the application of legal principles to subsidiary facts," *McNeilus Truck and Mfg., Inc. v. Ohio ex. rel. Montgomery*, 226 F.3d 429, 437 (6th Cir.2000), it is necessarily a determination subject to de novo appellate review.

As the court pointed out in *Mozes*, it is imperative that parents be able to assess the status of the law on habitual residence and wrongful removal and retention. 239 F.3d at 1072-73. If habitual residence is treated as a purely factual matter, to be decided by an individual judge in individual circumstances unique to each case, parents will never be able to guess, let alone determine, whether they are at risk of losing custody by allowing their children to visit overseas or in allowing them to make international trips with an estranged spouse. With such uncertainty, parents experienc-

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[16] Probable cause determinations involve the application of historical facts to a legal principle and are reviewed de novo. *Ornelas-Ledesma v. United States*, 517 U.S. 690, 696-97, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).

ing marital difficulties will be less likely to allow children to travel with one parent and less likely to allow children to maintain relationships with families in other countries. Congress must have intended that there be enough consistency in [897] these cases to prevent such a result. Indeed, we find it difficult to believe that American legislators intended to launch American citizens into such unchartable waters. Thus, we think it is not only the correct conclusion that habitual residence be a legal determination subject to de novo review, we also think it is the correct policy conclusion under the language of the Hague Convention and ICARA.

C. *Habitual Residence*

The Hague Convention has two objects: (1) "to secure the prompt return of children wrongfully removed to or retained in any Contracting State" and (2) "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." 19 I.L.M. 1501, Art. 1. The Hague Convention protects children from "wrongful removal or retention" from their "habitual residence." The Hague Convention defines wrongful removal,

> The removal or the retention of a child is to be considered wrongful where-- a) it is in breach of rights of custody attributed to a person ... under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Id. at Art. 3.

> Generally speaking, "wrongful removal" refers to the taking of a child from the person who was actually exercising custody of the child. "Wrongful retention" refers to the act of keeping the child without the consent of the person who was actually ex-

> ercising custody. The archetype of this conduct is the refusal by the noncustodial parent to return a child at the end of an authorized visitation period.

51 Fed.Reg. 10494. Julie concedes that she retained the children in the United States without Robert's permission and that Robert was exercising, and would have continued to exercise, his custody rights in Israel except for the removal. She argues, however, that the removal was not from the country of the children's "habitual residence," thus the Hague Convention does not apply. The district court agreed with her contention. *Silverman*, 2002 WL 971808.[17]

"Habitual residence" is not defined in the language of the Hague Convention or by ICARA. However, the text of the Convention directs courts to only one point in time in determining habitual residence: the point in time "immediately before the removal or retention." Art. 3. [898] Additionally, the text of the Convention points to the child's, not the parents', habitual residence. *Id.* A person may have only one habitual residence, and it should not be confused with domicile. *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 379

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[17] The district court actually stated, "the Court determines that the habitual residence of Sam and Jacob never changed from the United States to Israel and therefore, Julie's retention of the children in the United States since June 2000 was not wrongful." *Silverman*, 2002 WL 971808, at *6. This is an inaccurate application of the law under the Hague Convention, because the issues of "wrongful retention" and "habitual residence" are separate inquiries. *Feder*, 63 F.3d at 225. A wrongful removal/retention determination involves two questions: whether the custody rights of Robert were breached by the retention and whether he was exercising those rights at the time. *See id.* Julie does not challenge Robert's assertion that he was exercising his custody rights at the time of the retention, therefore, she does not challenge "wrongful retention" under the Hague Convention if Israel is determined to be the place of habitual residence. On the other hand, a finding that the children's habitual residence was not Israel denies Robert relief under the Convention because a removal from Israel of any sort, wrongful or not, would not be prohibited by the treaty. Robert cannot prevail under the reach of the Convention if Julie was simply returning the children to their habitual residence in the United States.

(8th Cir.1995); *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir.1993) (hereinafter "*Friedrich I*"). "[T]he court must focus on the child, not the parents, and examine past experience, not future intentions." *Nunez-Escudero*, 58 F.3d at 379, (citing Friedrich I, 983 F.2d at 1401). Habitual residence may only be altered by a change in geography and passage of time. *Id.*

Federal courts are agreed that "habitual residence" must encompass some form of "settled purpose." *Feder*, 63 F.3d at 222-23. This settled purpose need not be to stay in a new location forever, but the family must have a "sufficient degree of continuity to be properly described as settled." *Id.* at 223, (citing *In re Bates*, No. CA 122-89, High Court of Justice, Family Div'l Ct. Royal Courts of Justice, United Kingdom (1989)). Additionally, the settled purpose must be from the child's perspective, although parental intent is also taken into account. *Feder*, 63 F.3d at 222; *Friedrich I*, 983 F.2d at 1401.

In its determination that the Silvermans' habitual residence never changed from Minnesota to Israel, the district court enumerated its factual findings. The district court determined that 1) Robert and Julie sold their home in Minnesota prior to their move to Israel; 2) Julie wanted to move to Israel to raise her children; 3) the move was set up by the parents to be permanent; 4) the family shipped their household goods to Israel prior to their move; 5) the family rented an apartment in Israel; and 6) the children were enrolled in school in Israel and participated in activities there. *Silverman*, 2002 WL 971808, at *2-3. We need not disturb these findings. The district court coupled these facts with its factual conclusion that Julie was prevented from leaving Israel by the Tzav Ikuv from October to November of 1999 and that Robert would not have allowed Julie to leave Israel with the children from October 1999 until June 2000. Applying these facts to the Hague Convention, the district court concluded that, despite the intent present at the time of the move to Israel and the outward appearance of a permanent move, Julie's unilateral desire to return to the United

States, coupled with the alleged abuse from October 1999, eliminated the settled intent necessary to establish habitual residence. The district court erred.

The court should have looked at the habitual residence of the Silverman children at the time Julie removed them from Israel, keeping in mind that they could only have one habitual residence. The court should have determined the degree of settled purpose from the children's perspective, including the family's change in geography along with their personal possessions and pets, the passage of time, the family abandoning its prior residence and selling the house, the application for and securing of benefits only available to Israeli immigrants,[18] the children's enrollment [**899**] in school, and, to some degree, both parents' intentions at the time of the move to Israel. Fairly assessing these facts, there is only one acceptable legal conclusion regarding the children's habitual residence: they were habitual residents of Israel.

The Ninth Circuit anticipated the exact type of situation faced by the district court.

> [There are] cases where the court finds that the family as a unit has manifested a settled purpose to change habitual residence, despite the fact that one parent may have had qualms about the move. Most commonly, this occurs when both parents and the child translocate together under circumstances suggesting that they intend to make their home in

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[18] The district court also relied upon the fact that the Silvermans swore in a Minnesota bankruptcy proceeding that their permanent address was Minnesota and they signed an income tax return listing Minnesota as their permanent address. While these are interesting facts showing the lack of integrity of both parties, they are not legally sufficient to overcome the overwhelming facts showing that the Silvermans physically left Minnesota, moved everything to Israel, and swore to the Israeli government that they were permanent immigrants. The Minnesota address listed on the bankruptcy proceeding is not the only misstatement by the Silvermans in that proceeding. Julie also concealed a $9000 "gift" to her father before she filed for the bankruptcy.

> the new country. When courts find that a family has jointly taken all the steps associated with abandoning habitual residence in one country to take it up in another, they are generally unwilling to let one parent's alleged reservations about the move stand in the way of finding a shared and settled purpose.

Mozes, 239 F.3d at 1076-77.

In *Feder*, the Third Circuit reversed a trial court's determination of habitual residence in a case with several facts similar to this one. 63 F.3d at 220 & 224. The parents moved to Australia with their son. The father intended to stay there, while the mother had doubts about her marriage and about Australia. The family did not sell their house in the United States, but did buy one in Australia. Six months after moving to Australia, the mother took the son on a "vacation" to the United States and, while there, filed for divorce and custody. *Id.* The trial court found that the son's habitual residence was the United States because the mother never decided for sure to stay in Australia. The Third Circuit reversed, emphasizing the need to look at both parents' intentions and the lifestyle of the son (who had enrolled in school in Australia), discounting the mother's plan to return to the United States if the marriage failed while in Australia. *Id.* These facts are analogous to the facts in this case and we agree with the Third Circuit that one spouse harboring reluctance during a move does not eliminate the settled purpose from the children's perspective.

The district court also failed to consider that Julie initially contemplated a divorce in Israel, although the record supports this fact, especially given her testimony that her reluctance was not based upon living in Israel but upon the viability of her marriage. When she contacted an attorney in Israel, however, she was told that she would lose custody of her children in the Israeli Rabbinical courts. In *Rydder v. Rydder*, 49 F.3d 369, 372 (8th Cir.1995), this court addressed a "habitual residence" issue by referring to the primary purpose of the Hague Convention: "to restore the *status quo*

ante and to deter parents from crossing international boundaries in search of a more sympathetic court." This court upheld the district court's decision to return children to their father in Poland after their mother, who was having marital difficulties, took them to the United States, without the consent of her husband, to obtain a divorce and custody. *Id.* This case is analogous. After speaking with her attorney in Israel, but without filing for a divorce or custody there, Julie moved to the United States and promptly obtained the desired custody decision here. This appears to be the sort of forum shopping addressed in *Rydder* that the Convention was designed to prevent. *Id.*

[**900**] Finally, the district court also found that the habitual residence of the children did not change because Julie's residence in Israel was coerced due to the abuse she suffered. Habitual residence is not established when the removing spouse is coerced involuntarily to move to or remain in another country. *Tsarbopoulos v. Tsarbopoulos*, 176 F.Supp.2d 1045, 1055 (E.D.Wash.2001) (father's intent to remain in foreign country concealed from mother and abuse of mother and children eliminated any choice in the move); *In re Application of Ponath*, 829 F.Supp. 363, 367 (D.Utah 1993) (move was expressed to be, and intended by mother to be, an extended vacation). Unlike the situations in *Tsarbopoulos* and *Ponath*, the record here establishes that there was no abuse prior to the move or for at least two months after the move, there was no coercion in getting Julie to move to Israel, and there is no alleged abuse of the children. Julie intended to move permanently to Israel prior to the move and, upon arrival in July, she intended to make Israel her home. She was the primary force behind the family's relocation to Israel and she always intended to return to Israel to raise her children.[19] Her subsequent, post-move desire to return to the United States, and the finding by the

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[19] Prior to marrying Robert, Julie spent two years of high school, one year of college, and two years working (1987-1989) in Israel.

district court that she was subjected to coercion and abuse beginning two months after her arrival, does not change the legal conclusion that the habitual residence of the children changed from Minnesota to Israel.

For these reasons, we find that the children's habitual residence is in Israel and that Robert has met his burden of presenting a prima facie case under the Convention.

D. *Grave Risk of Harm*

The district court found that even if the children's habitual residence is in Israel, they need not be returned to Israel because they will face a "grave risk of physical harm" there. *Silverman*, 2002 WL 971808, at *8. The district court reached this conclusion, in part, because the violence in Israel makes it a "zone of war," which is dangerous for the children. *Id.*

The "grave risk of physical or psychological harm" defense is an affirmative defense under Article 13(b) of the Convention that Julie must prove with clear and convincing evidence. 42 U.S.C. § 11603(e)(2)(A); *Friedrich I*, 983 F.2d at 1400. In *Rydder*, this court held that in order to apply the Article 13(b) exception, the court would need to cite specific evidence of potential harm to the individual children. 49 F.3d at 373. There are two types of grave risk that are appropriate under Article 13(b): sending a child to a "zone of war, famine, or disease," or in cases of serious abuse or neglect. *Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir.1996) (hereinafter "*Friedrich II*"); *Blondin v. Dubois*, 238 F.3d 153, 162 (2d Cir.2001).

The district court found that the current situation in Israel constitutes a "zone of war," warranting application of the "grave risk" exception. In *Freier v. Freier*, 969 F.Supp. 436, 443 (E.D.Mich.1996), the district court found that Israel in 1996 was not a "zone of war" under Article 13(b). In so finding, the court determined that the fighting was fifteen to ninety minutes from the children's home, no schools were closed, businesses were open, and the mother was able to travel to and from the [**901**] country. *Id.* No subsequent case

has found that Israel is a "zone of war" under the Convention. In fact, there does not appear to be another case that finds any country a "zone of war" under the Convention.[20] Nor does the district court cite any evidence that these children are in any more specific danger living in Israel than they were when their mother voluntarily moved them there in 1999. Rather, the evidence centered on general regional violence, such as suicide bombers, that threaten everyone in Israel. This is not sufficient to establish a "zone of war" which puts the children in "grave risk of physical or psychological harm" under the Convention.

Additionally, the district court erred in taking into account the "fact that Sam and Jacob are settled in their new environment." *Silverman*, 2002 WL 971808, at *10. A removing parent "must not be allowed to abduct a child and then-when brought to court-complain that the child has grown used to the surroundings to which they were abducted." *Friedrich II*, 78 F.3d at 1068.

Israel is not a "zone of war" as meant by the Convention and, therefore, Julie has not met her burden of proving that a grave risk of harm exists. As no other exception applies, the district court erred in denying Robert's Hague petition.

III. *CONCLUSION*

For the reasons stated above, we reverse the district court. Israel is the habitual residence of the Silverman children and Julie wrongfully removed the children from their habitual residence. The Convention requires us to return wrongfully removed children to their habitual residence, unless specific, limited exceptions apply. No exceptions to the Hague Convention apply, and the Minnesota court's custody determination cannot be used to prevent us from returning the children to Israel. 51 Fed.Reg. 10494-01,

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[20] The district court and Julie did not cite any cases to the contrary. On August 13, 2002, in *Mendez Lynch v. Mendez Lynch*, the District Court of Florida considered, and rejected, a claim that Argentina is a zone of war under the Convention. 220 F.Supp.2d 1347, 1365-66 (M.D.Fla.2002).

turning the children to Israel. 51 Fed.Reg. 10494-01, § ID1. Israel is the proper forum for a custody determination. We remand for entry of an order that the Silverman children be returned to Israel for a custody determination in the Israeli courts.

MELLOY, Circuit Judge, concurring in part and dissenting in part.

I concur with all of the majority opinion in this case, with the exception of Division III. Division III states that no exceptions to the Hague Convention apply and remands the case for entry of an order returning the children to Israel. I dissent from that portion of the majority opinion for the reason that it does not address Judge Heaney's argument that one of the Hague Convention defenses as to removal is a finding: "... that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." Hague Convention on the Civil Aspects of International Child Abduction, Art. 13, 19 I.L.M. 1501, 1502-03 (1980).

In this case, the district court made a finding that Samuel is of sufficient age and maturity to express his views and that he does not wish to be returned to Israel. The majority does not address that finding. I find nothing in the record to indicate that such a finding is clearly erroneous. At a minimum, I agree with the dissent that the case should be remanded for further proceedings to determine the [902] views, if any, of both Samuel and Jacob, and for a further determination as to whether each child has attained an age and degree of maturity for which it would be appropriate to take into consideration their views.

Accordingly, I concur in the well-reasoned decision of the majority, with the exception of that portion of the conclusion which failed to remand the case for a further determination as to the views of each child and their level of maturity.

HEANEY, Circuit Judge, with whom McMILLIAN, MURPHY, and BYE, Circuit Judges, join dissenting.

I respectfully dissent. Assuming a habitual residence determination raises mixed questions of law and fact, the result reached by the majority is inconsistent with *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir.2001), a case upon which the majority heavily relies. It is well settled that where the primary issue is whether the parents intended to abandon a prior habitual residence, great deference must be given to the factual findings of the district court. Here, the district court unequivocally found that, based on the entirety of the evidence, Robert and Julie Silverman did not have a mutual, settled intent to abandon the United States as their children's primary residence. The district court found their habitual residence remained the United States, and this finding is not clearly erroneous. Thus, the district court must be affirmed.

Even if one agrees with the holding of the majority that Israel is the habitual residence of the Silverman children, Samuel and Jacob, the Hague Convention dictates that it is still necessary to remand the case to the district court for a determination of whether Samuel should return to Israel in view of his strongly stated desire to remain in the United States with his mother. If it finds that Samuel's views are sufficiently mature to require acquiescence by the district court, that should end the matter. If not, the court must still consider the psychological harm he may suffer from being ordered to return to Israel. Moreover, the district court must also consider Jacob's views on the matter. If Jacob's views are not sufficiently mature to be controlling, the district court must still consider whether he would be psychologically harmed by being removed from his family in the United States.[21]

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[21] I do not disagree with the majority's view with respect to the *Rooker-Feldman* doctrine.

I. *BACKGROUND*

At the outset, it is important that we set straight the background facts recited in the majority's opinion. Although the majority quotes Julie as testifying that she was always the one pushing to move to Israel, (Tr. 8), it neglects to point out that Julie subsequently testified, "I couldn't imagine making a permanent move so far away from my family and my home if my marriage was going to not work." (Tr. 89.) Robert seconded this view of Julie's intentions. He testified that he had examined e-mails sent to Julie by her current husband: "It was never [Julie's] intention to leave and be [with me] in Israel, but to be with this gentleman." (Tr. 42.)

The majority states that Robert and Julie lived with relatives in Israel from July 1999 to November 1999, when they signed a one-year lease for an apartment. Notably, it concedes that Robert would not have allowed Julie to leave Israel with the children at any point between October 1999 and June 2000. In fact, Robert's testimony was that he would not have permitted the children to leave Israel as early as September of 1999. (Tr. 59.) Thus, even by Robert's own testimony, Julie remained [**903**] in Israel of her own free will for only one month, hardly a sufficient period of time to establish a joint intention that Israel would be the habitual residence of Samuel and Jacob. *See, e.g., In re Application of Ponath*, 829 F.Supp. 363, 367 (D.Utah 1993) (finding no habitual residence where mother and child detained for months by means of coercion).

Sometime in January 2000, Robert and Julie returned to Minnesota to complete bankruptcy proceedings. At that time both stated that their permanent address was Plymouth, Minnesota. (Tr. 57.) While living in Israel in April 2000, Robert and Julie signed and filed a joint United States income tax form for 1999, listing their address as Plymouth, Minnesota. (Tr. 58.) They made these declarations either under oath or under penalty of perjury. The majority gives little weight to these factors, suggesting this could only mean that both Robert and Julie lied when they claimed Minnesota as their address. The fact is that Julie considered

the United States to be her habitual residence and that of Samuel and Jacob at all times during these proceedings, a position adopted by the district court. Julie's position as to residency has been consistent throughout; it is only Robert who has claimed different residences--first Minnesota for tax and bankruptcy proceedings, then Israel for family law proceedings--to suit his needs. In my view, the district court properly considered the documents indicating the Silvermans were Minnesota residents as adding to the weight of the evidence that the couple never shared a intention to make Israel their habitual residence.

Julie contends that Robert engaged in threats, physical abuse, and coercion to force her to remain in Israel. In footnote six of its opinion, the majority concurred with the district court that there was physical violence against Julie by Robert, but went on to state: "[W]e do find it prudent to note that Julie also engaged in physical violence towards Robert." *Ante* at 890, n. 6. Julie's testimony about the incident paints a different picture:

> [Robert] picked me up from the airport after I had stayed a few extra days for the bankruptcy. He started screaming at me that I had been with Steve. He pushed my head against the window, so I flung back this way. I hit him in the mouth, on this corner, and I made him bleed.
>
> And at that point, he leaned over and opened the car door while he was driving. He couldn't get the seat belt undone.

(Tr. 96-97.) In response to the question, "How did you interpret when he leaned over to open the car door?" Julie answered, "That he was going to push me out of the car." (Tr. 97.) Julie also testified that at other times Robert would "hold me up against the wall and bang me. There were stone walls in our apartment. And he would ask me to tell him that I didn't love Steve." When asked if she was physically injured as a result, she responded, "I was not injured. I was hurt. I mean he was slamming me against the wall." *Id.*

II. *ANALYSIS*

A. *Habitual Residence of the Children*

I begin my analysis by considering the applicable standard of review. The majority overstates the matter, leaving one with the impression that we should essentially impose our own view of habitual residence, giving no deference to the district court's superior position in assessing the circumstances. The Second Circuit recently stated the applicable standard of review in cases arising under the Hague Convention. [**904**] See *Blondin v. Dub*ois, 238 F.3d 153 (2d Cir.2001). The district court's factual determinations are reviewed for clear error, while the district court's legal analysis is subject to de novo review. *Blondin*, 238 F.3d at 158 (citing *Croll v. Croll*, 229 F.3d 133, 136 (2d Cir.2000); *Walsh v. Walsh*, 221 F.3d 204, 214 (1st Cir.2000); *Shalit v. Coppe*, 182 F.3d 1124, 1127 (9th Cir.1999); *Lops v. Lops*, 140 F.3d 927, 935 (11th Cir.1998); and *Friedrich v. Friedrich*, 78 F.3d 1060, 1064 (6th Cir.1996)). Stated another way, the interpretation and application of treaty language is reviewed de novo, but the underlying factual findings are reviewed for clear error. Blondin, 238 F.3d at 158 (citing *Feder v. Evans-Feder*, 63 F.3d 217, 222 n. 9 (3d Cir.1995); and *Cree v. Flores*, 157 F.3d 762, 768 (9th Cir.1998)). Accepting this analysis, we review the district court's factual findings, including its finding that there was no settled intent to abandon the United States, for clear error. *Accord Mozes v. Mozes*, 239 F.3d 1067, 1075-76 (9th Cir.2001) ("Whether there is a settled intention to abandon a prior habitual residence is a question of fact as to which we defer to the district court.")

The majority's reliance on *Mozes* to support its position that we review the district court's habitual residence determination de novo standard is specious. A close reading of *Mozes* reveals that it is indeed a slender reed upon which to base the conclusion reached by the majority. *Mozes* clearly stands for the proposition that the intent of the parties to abandon a prior habitual residence is an issue of fact to be determined by the district court, to which we owe great deference. Here, the district court unequivocally found that the Silvermans had not abandoned their habitual residence

Silvermans had not abandoned their habitual residence in the United States.

In *Mozes*, Arnon and Michal were Israeli citizens who married in 1982. They had four children ranging in age from seven to sixteen years old. In April 1997, with Arnon's consent, Michal and the children moved to Los Angeles, where she leased a home, purchased an automobile, and enrolled the children in school. Arnon remained in Israel, but he paid for both the house and the car used by the family, and stayed with them during his visits to Los Angeles. One year after Michal and the children arrived in the United States, she filed an action in California state court seeking a dissolution of the marriage and custody of the children. The court granted temporary custody to Michal and entered a temporary restraining order enjoining Arnon from removing the children from southern California. Less than one month later, Arnon filed a petition in federal district court seeking to have the children returned to Israel under the Hague Convention. The oldest child elected to return to Israel and did so by mutual agreement. The district court denied the petition of the father with respect to the other three children, one age nine and two age five, and the husband appealed to the Ninth Circuit.[22]

In a lengthy opinion, the appellate court stated that the first question to be answered is whether there was a settled intention to abandon the family's prior habitual residence. *Mozes*, 239 F.3d at 1075-76. The court emphasized that this was a question of fact, to which we defer to the district court. *Id.* at 1076. "[T]he intention or purpose which has to be taken [**905**] into account is that of the person or persons entitled to fix the place of a child's residence," *id.* (citation

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[22] In *Mozes*, the children had lived in Israel their entire lives and were taken by their mother, Michal, to Los Angeles where they remained for one year before Michal began an action to obtain custody of the children. Here, we have the reverse situation. The children lived in the United States their entire lives, were taken to Israel, and remained there voluntarily for only one month.

and internal quotation marks omitted), which in this case would be both parents. Where the parents disagree, the courts must determine from all available evidence whether the parent petitioning for the return of the child has established by a preponderance of the evidence that the habitual residence is the place where petitioner claims it to be. 42 U.S.C. § 11603(e)(1); *see Mozes*, 239 F.3d at 1083 (stating petitioner bears burden of showing "brute facts" that point unequivocally to conclusion that parents jointly intended to alter habitual residence). Where the evidence is conflicting, the finding of the district court is entitled to great deference. *Mozes*, 239 F.3d at 1077-78.[23]

The majority errs in this regard by focusing only on Robert's intent and disregarding the intentions of Julie. The district court found:

> [T]he habitual residence of Sam and Jacob never changed from the United States to Israel and therefore, Julie's retention of the children in the United States since June 2000 was not wrongful. With the exception of the eleven months spent in Israel, Sam and Jacob have spent their entire lives in the United States. The evidence also indicates that their time in Israel would have been much shorter had Julie not been prevented from leaving Israel with the children from [September] 1999 until June of 2000.

Silverman v. Silverman, No. 00-2274, 2002 WL 971808, at *6 (D.Minn. May 9, 2002). Where the intent to abandon a prior

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[23] In *Feder v. Evans-Feder*, 63 F.3d 217 (3d Cir.1995), the Third Circuit recognized that a determination of the habitual residence necessitates consideration of the shared intention of the parents, *id.* at 224, and that where parents disagree the question is whether the petitioner has established by a preponderance of the evidence that the habitual residence is where petitioner claims it to be, *id.* at 222. The *Feder* court did not discuss the important question decided in *Mozes*, i.e., whether the determination of the parents' settled intent to alter their habitual residence is a factual finding.

habitual residence is a critical issue, as it is here, the district court's findings effectively control the decision as to the habitual residence of the children. *Mozes*, 239 F.3d at 1072-73. These are obviously factual findings, entitled to great deference, and we are obligated to accept them unless they are clearly erroneous. In my view, they are not.

Contrary to the impression left by the majority, the court in *Mozes* did not find that the parents had a settled intent to abandon Israel as their habitual residence. In fact, it did not decide that issue. It rather remanded the matter to the district court to make that determination, reaffirming that the burden of proof rested with the petitioner.[24] In this case, the district court has already made those findings, and concluded that the children's habitual residence remained the United States because the Silvermans did not have a shared intention to abandon the United States.

The district court here did precisely what was required of it under the Hague Convention--it examined all of the circumstances and determined that the Silvermans did not have a mutual, settled intent to abandon the United States as the habitual residence of their children. Its [**906**] decision is fully supported by the record evidence in this case. The majority selectively emphasizes a few facts that might have led the district court to a contrary conclusion, particularly that the Silvermans had sold their house and moved their belongings to Israel. However, by training its focus so intently on these few facts, the majority glosses over those that weaken its position: the family was only away from the United States for a short time (even shorter when one considers that ten of the eleven months Julie and the children spent there were under duress); they never bought real

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[24] The appellate court stated that "the appropriate inquiry under the Convention is whether the United States had supplanted Israel as the locus of the children's family and social development. As the district court did not answer this question, we must remand and allow it to do so." *Mozes*, 239 F.3d at 1084.

property while in Israel; and, perhaps most importantly, they maintained that Minnesota was their home in two separate proceedings, both of which occurred while they were living in Israel. In light of the complete record, it is clear that the district court was well within its discretion in finding that Robert did not carry his burden. I would affirm the district court's habitual residency determination.

B. *Affirmative Defenses to Removal*

I next come to the question of whether Samuel and Jacob should be returned to Israel if it is their habitual residence. Article 13 of the Hague Convention provides:

> [T]he judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that--
>
> ....
>
> there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

Hague Convention on the Civil Aspects of International Child Abduction, art. 13, 19 I.L.M. 1501, 1502-03 (1980).

Here, the district court held that even if it had determined that Israel was the habitual residence of Samuel and Jacob, it found in the alternative "that their return to Israel would pose a grave risk of physical harm or otherwise place them in an intolerable situation." *Silverman*, 2002 WL 971808, at *8. The district court noted that in *Freier v. Freier*, 969 F.Supp. 436 (E.D.Mich.1996), evidence of unrest in Israel was insufficient to establish the grave risk defense.

The district court went on to say that it did not agree with *Freier's* conclusion in this case because:

> Significant differences exist between the violence occurring at the time *Freir* [sic] was decided and the violence occurring in Israel today. Unlike before, the violence has permeated areas that were previously unaffected by the conflict. Furthermore, the type of violence, through suicide bombings, has placed civilians, including children, at much greater risk. The level and intensity of violence occurring in Israel today thus goes well beyond "some unrest" described in *Freier*. In the Court's view, the current situation in Israel meets the "zone of war" standard contemplated by the Sixth Circuit in *Friedrich*.[25]

Silverman, 2002 WL 971808, at *10.

The majority rejects these findings, and instead resolves that Israel is not a zone of war as meant by the Convention. While I agree with this conclusion, neither the district court nor this court have answered the question of whether returning the children [907] to Israel, given its current conditions, may cause them to suffer psychological harm. In my view, the fact that the specific area in which Samuel and Jacob would live is not a zone of war, still does not answer the question of whether they will be psychologically harmed because of the situation that currently exists in Israel.[26] Moreover, it would clearly be harmful for the children to be removed from the United States and their

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[25] *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir.1996).

[26] On this point, I believe it particularly relevant to reference a lengthy letter written by Samuel to the district court. In it, he expressed his concern about returning to Israel, and made clear that he was worried about his own and his brother's safety if they were forced back. (Appellant's App. at 286-87.) As this is direct evidence of the psychological harm Samuel would suffer if returned, I believe it proper for the district court to consider the letter for that purpose.

mother, or each other, after spending the great majority of their lives here. Therefore, I believe we have no alternative but to remand to the district court to determine whether Samuel and Jacob will be subjected to psychological harm if they are separately or collectively removed from their mother's home in the United States and forced to return to Israel.[27]

Additionally, the majority does not consider the finding of the district court that Samuel objects to returning to Israel and that he is mature and old enough for the court to consider his views.[28] The district court notes:

> The evidence presented at the hearing reveal[s] that Sam is a very bright and intelligent individual. He is a gifted child, which means he is in a class that is on par with his academics. He reads newspapers each day to follow events in Israel. The Court is particularly impressed by his behavior in learning of the upcoming legal proceedings and his desire to express his views in a letter and have them considered by the Court. The Court witnessed Sam's maturity firsthand in discussions with him in chambers after the hearing. In both the Court's private discussions with Sam and in the presence of counsel, the Court was impressed by the level of maturity exhibited by Sam. It was evident that he under-

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[27] Of course, Julie would bear the burden of proving by clear and convincing evidence the children would be harmed psychologically by removal. 42 U.S.C. § 11603(e)(2)(A).

[28] As mentioned in footnote six of this dissent, Samuel wrote a lengthy letter to the district court in which he made clear his wishes. He stated that he was writing to inform the court that he wanted to live in the United States, largely because of his familial, social, and educational ties. He also noted that while he misses his father and some friends in Israel, he would not want to live there in large part because he believes it to be a dangerous place for him and his brother. The majority opinion makes no mention of Samuel's letter. I agree with the district court that it is relevant and helpful to our decision.

> stood the purpose and significance of these proceedings.... Finally, the Court finds that Sam, at age 10, is sufficiently old enough to have his views considered.

Silverman, 2002 WL 971808, at *10.

I agree with the district court that Samuel is mature enough to make his own decisions on this matter, and he clearly articulates the reasons he does not want to return to Israel. His decision on that matter should be respected. *Blondin*, 238 F.3d at 165-66. Because Article 13 gives courts authority to refuse to return children where 1) the child, of sufficient age and maturity, objects to returning to his habitual residence, or 2) there is evidence that returning the child will expose the child to psychological harm, the district court, on remand, should strongly consider [908] these exceptions for Samuel, in light of his letter and other evidence.

This leaves the question of Jacob's fate. Jacob will be eight years old in July of 2003. He has not yet expressed his views to the court on this matter, nor has the district court determined if he is sufficiently mature to bring Article 13 into play. If Jacob now wishes to be heard, the district court should allow him to state his feelings. If his views are sufficiently mature and he wants to stay in the United States, that would end the matter. However, in light of Samuel's stated wishes, even if Jacob does not make his views known, the district court must still assess the psychological harm that would result if Jacob were returned to Israel and likely separated from his older brother.

CONCLUSION

I agree with the district court that this case should be settled by the parties rather than by the court. There is no good reason why Robert and Julie should not be able to agree on a plan which would permit both parents to share custody of the children. Failing an agreement between the parents, we have no alternative but to affirm the district court. The Ninth Circuit, the font of many decided cases in this difficult area of law, makes it crystal clear that the ques-

tion of whether the parents of minor children have a joint, settled intention to abandon a habitual residence is a question of fact. This must, of course, be determined by the district court and reviewed by our court on the clearly erroneous standard. Having found no reported cases to the contrary, I would affirm the district court's well-supported decision.

APPENDIX B

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

ROBERT HECHTER SILVERMAN,
Appellant,

v.

JULIE HECHTER SILVERMAN,
Appellee.

No. 02-2496.

Submitted: Oct. 10, 2002.
Filed: Dec. 11, 2002.

Rehearing En Banc Granted Feb. 12, 2003.*

[312 F.3d 914]

Before MURPHY, HEANEY and BEAM, Circuit Judges.

HEANEY, Circuit Judge.

Robert Silverman appeals the district court's ruling that his children were not habitual residents of Israel at the time their mother brought them to the United States and that, even if they were, their return to Israel would be denied because doing so would pose a grave risk of harm to them. The issues before us are whether the district court (1) improperly determined that the Silverman children's habitual residence is the United States; and (2) improperly applied the

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* Judge Beam would grant the petition for panel rehearing.

grave risk of harm defense by refusing to return the children to Israel. Because we affirm the district court on the first issue, we do not reach the second issue.

I. *Standard of Review*

Neither the Eighth Circuit nor international jurisprudence has articulated a standard of review for the consideration of habitual residence under the Hague Convention on the Civil Aspects of International Child Abduction, Dec. 23, 1981, 51 Fed.Reg. 10494, as implemented by the United States in the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610. Furthermore, "habitual residence" has not been defined in either the Convention or the Act, and courts must look to the legislative history for guidance on the matter. The official history and commentary in the Federal Register explains that " 'habitual residence' ... is, in fact, a familiar notion of the Hague Conference, where it is understood as *a purely factual concept*, to be differentiated especially from that of the 'domicile.' " *Feder v. Evans-Feder*, 63 F.3d 217, 228 (3d Cir.1995) (quoting Elisa Perez-Vera, "Report of the Special Commission," *Conference de law Haye de droit international prive: Actes et documents de la Quatorzieme session*, Vol. III, Child Abduction, 60 at 189). "[T]he official history's characterization of habitual residence as 'a purely factual concept' is powerful evidence that its drafters intended a determination of habitual residence to be one of fact, not of law." *Evans- Feder*, 63 F.3d at 228 (Sarokin, J., dissenting).

The Ninth and Third Circuits have determined that habitual residence can raise [916] mixed questions of fact and law and therefore should be reviewed de novo. *Mozes v. Mozes*, 239 F.3d 1067, 1073 (9th Cir.2001) ("Where, however, the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then ... the question should be classified as one of law and reviewed de novo."); *Evans-Feder*, 63 F.3d 217, 222 n. 9 (3d Cir.1995) ("[W]e believe that the determination of habitual residence is not purely factual, but requires the application of a legal standard ... to histori-

cal and narrative facts. It is, therefore, a conclusion of law or at least a determination of a mixed question of law and fact.").

We are not persuaded that in this circumstance the Silverman children's habitual residence inquiry raises mixed questions of law and fact. Resolution of this case is largely fact-based, as are most cases arising under the Hague Convention. *See, e.g., Mozes*, 239 F.3d at 1076 ("[I]n those cases where intention or purpose is relevant--for example, where it is necessary to decide whether an absence is intended to be temporary and short-term--the intention or purpose which has to be taken into account is that of the person or persons entitled to fix the place of the child's residence.") (citation omitted); *Evans-Feder*, 63 F.3d at 229 ("[A] child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective."); *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir.1993) ("To determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions."). In *Rydder v. Rydder*, 49 F.3d 369, 373 (8th Cir.1995), this circuit held that there is "no real distinction between habitual and ordinary residence," and relied on *In Re Bates*, No. CA 122.89, High Court of Justice, United Kingdom (1989), which observed that:

> It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term as common law domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or presuppositions.

It is quite evident that "[t]he jurisprudence of habitual residence has generally reflected the fact-bound nature of the inquiry." *Evans-Feder*, 63 F.3d at 228 (Sarokin, J., dissenting).

In its conclusions of law, the district court found that the determination of habitual residence is a fact-based inquiry to be analyzed on a case-by-case basis. We agree with the court below that the Silverman children's habitual residence is solely a question of fact, and we therefore review the district court's holding for clear error.

Pursuant to the Hague Convention, Robert Silverman (Robert) must initially prove by a preponderance of the evidence that Julie Silverman (Julie) removed their children from their habitual residence, which Robert alleges is Israel. 42 U.S.C. § 11603(e)(1)(A). If he meets this burden, Julie must show by clear and convincing evidence the applicability of one of the exceptions set forth in Articles 13b or 20 of the Convention. 42 U.S.C. § 11603(e)(2)(A); *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 375-76 (8th Cir.1995). Because we believe the district court properly concluded that the boys' habitual residence is the United States, we do not reach the affirmative defense presented by Julie.

The district court concluded that Sam and Jacob's habitual residence never [917] changed from the United States to Israel for the following reasons: with the exception of the eleven months that the boys lived in Israel (July 1999 through June 2000), they have lived their entire lives in the United States; their time in Israel would have been shortened had Julie been free to travel outside of Israel sooner; Julie's residence in Israel was coerced; she moved to Israel to attempt to preserve her marriage, but did not intend to make Israel the family's habitual residence; and there are questions regarding the family's intent to live in Israel permanently. Furthermore, in January 2000, Julie and Robert returned to Minnesota to complete bankruptcy proceedings, where they both stated under oath that their permanent address was Plymouth, Minnesota. In April 2000, they filed a joint United States income tax form for 1999, which listed their address as Plymouth, Minnesota.

We conclude that the determination of Sam and Jacob's habitual residence is a factual finding, and hold that the dis-

trict court's findings are not clearly erroneous. We affirm its ruling that the boys' habitual residence is the United States.

BEAM, Circuit Judge, dissenting.

I respectfully dissent. The district court erred in ruling that the Silverman children's habitual residence was in the United States and that the children would be subjected to a grave risk of harm if they were returned to Israel. Therefore, I would reverse the district court's decision.

First, I disagree with the court's standard of review. While the underlying findings of fact in this case should be reviewed for clear error, the application of the Hague Convention to those findings is not a pure factual question as the court suggests. *Blondin v. Dubois*, 238 F.3d 153, 158 (2d Cir.2001) (the "application of the Convention to the facts [the district court] has found ... is subject to de novo review"). The determination of habitual residence under the Convention is based on facts, but the conclusion is a legal determination. Such a determination warrants at least heightened review, if not de novo review. We should follow the well-reasoned decision of the Third Circuit in *Feder v. Evans-Feder*, 63 F.3d 217, 222 n. 9 (3d Cir.1995), and employ a mixed standard of review. Using that standard, we should uphold the basic findings of fact of the district court,[1] but reverse the resulting determination that the children's habitual residence never changed from the United States. Nevertheless, even utilizing the court's clear error standard of review, I would find that the district court committed a clear error in finding that the United States is the Silverman children's habitual residence.

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[1] Such facts include those facts enumerated by the district court under the heading "Findings of Fact." *Silverman v. Silverman*, No. Civ. 00-2274, 2002 WL 971808, at *1-4 (D.Minn. May 9, 2002). At no point in this section of the opinion does the district court include its determination that the United States is the children's habitual residence. This determination occurs later in the opinion, under the heading "Conclusions of Law."

As part of its factual findings, the district court determined that 1) Robert and Julie sold their home in Minnesota, 2) Julie wanted to move to Israel to raise her children, 3) the move was intended to be permanent, 4) the family rented an apartment in Israel, and 5) the children were enrolled in school in Israel and participated in activities there. These facts all show parental intent to move and remain in Israel with the children, *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir.1993) (*Freidrich I*), as well as a "degree of settled purpose" from the children's perspective. *Feder*, 63 F.3d at 224. Despite [**918**] these facts, the court determined that the children's habitual residence never shifted from Minnesota because Julie was abused by Robert after they arrived in Israel, Julie changed her mind and would have moved back to Minnesota after only a few months had Robert allowed her to, and both Robert and Julie had sworn under oath that their residence was Minnesota in the bankruptcy proceedings. These facts are all either irrelevant or misapplied.

In *Feder*, 63 F.3d at 220, 224, the Third Circuit reversed a trial court's determination of habitual residence in a case with facts similar to this one. In *Feder*, the parents moved to Australia with their son. The father intended to stay there, while the mother had doubts about her marriage and about Australia. The family did not sell their house in the United States, but did buy one in Australia. Six months after moving to Australia, the mother took the son on a "vacation" to the United States and, while there, filed for divorce and custody. The trial court found that the son's habitual residence was the United States because the mother never decided for sure to stay in Australia. The Third Circuit reversed, emphasizing the need to look at both parents' intentions and the lifestyle of the son (who had enrolled in school in Australia) and discounting the mother's plan to return to the United States if the marriage failed while in Australia. *Id.* at 224. These facts are analogous to the facts in this case. Julie's change of heart about remaining in Israel does not affect her children's habitual residence there.

The district court in this case also found that Julie's continued residence in Israel was coerced. Habitual residence is not established when the removing spouse is coerced involuntarily to move to or remain in another country. *Tsarbopoulos v. Tsarbopoulos*, 176 F.Supp.2d 1045, 1055 (E.D.Wash.2001) (father's intent to remain in foreign country concealed from mother and abuse of mother and children eliminated any choice in the move); *Ponath v. Ponath*, 829 F.Supp. 363, 367 (D.Utah 1993) ("move" was expressed to be, and intended by mother to be, an extended vacation). Unlike the situations in *Tsarbopoulos* and *Ponath*, here there was no abuse prior to the move, there was no coercion in getting Julie to move to Israel, and there is no alleged abuse of the children. Julie intended to move to Israel and she intended to make Israel her home.

The district court also fails to consider that Julie initially wanted to get a divorce in Israel, although the record supports this fact. When she contacted an attorney in Israel, however, she was told that she would probably lose custody of her children in the Israeli Rabbinical court. In *Rydder v. Rydder*, 49 F.3d 369, 372 (8th Cir.1995), this court addressed a "habitual residence" issue by referring to the primary purpose of the Convention: "to restore the *status quo ante* and to deter parents from crossing international boundaries in search of a more sympathetic court." This court upheld the district court's decision to return children to their father in Poland after their mother, who was having marital difficulties, took them to the United States, without the consent of her husband, to obtain a divorce and custody. *Id.* This case is analogous. After speaking with her attorney in Israel, but without filing for a divorce or custody there, Julie moved to the United States and promptly obtained the desired custody decision here. This appears to be the sort of forum shopping addressed in *Rydder* that the Convention was designed to prevent. *Id.*

For these reasons, we should find that the children's habitual residence is in Israel and that Robert has met his burden of presenting a prima facie case under the [919]

Convention. Unlike the court, I would therefore address the second ruling by the district court that Julie has proven an exception to the Convention under Article 13(b). Both parties agreed that this determination should be reviewed de novo.

The district court found that even if the children's habitual residence is in Israel, they need not be returned to Israel because they face a "grave risk of physical harm" if returned there. The district court reached this conclusion, in part, because the violence in Israel makes it a "zone of war" which is dangerous for the children.

The grave risk of physical or psychological harm defense is an affirmative defense that Julie must prove with clear and convincing evidence. 42 U.S.C. § 11603; *Friedrich I*, 983 F.2d at 1400. In *Rydder*, this court held that in order to apply the Article 13(b) exception, the court would need to cite specific evidence of potential harm to the individual children. 49 F.3d at 373. There are two types of grave risk that are appropriate under Article 13(b): sending a child to a "zone of war, famine, or disease," or in cases of serious abuse or neglect. *Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir.1996) (Friedrich II); *Dubois*, 238 F.3d at 162.

The district court found that the current situation in Israel constitutes a "zone of war" warranting application of the "grave risk" exception. In *Freier v. Freier*, 969 F.Supp. 436, 443 (E.D.Mich.1996), the district court found that Israel in 1996 was not a "zone of war" under Article 13(b). In so finding, the court determined that the fighting was 15-90 minutes from the children's home, no schools were closed, businesses were open, and the mother was able to travel to and from the country. *Id.* No subsequent case has found that Israel is a "zone of war" under the Convention. In fact, there does not appear to be a case that finds any country a "zone of war" under the Convention.[2] Nor does the district court cite

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[2] The district court and Julie did not cite any cases to the contrary. On August 13, 2002, in *Mendez Lynch v. Mendez Lynch*, the District Court

any evidence that these children are in any more specific danger living in Israel than they were when their mother voluntarily moved them there in 1999. Rather, the evidence centered on general regional violence, such as suicide bombers, that threaten everyone in Israel.

Additionally, the district court erred in taking into account the "fact that Sam and Jacob are settled in their new environment."[4] A removing parent "must not be allowed to abduct a child and then-when brought to court- complain that the child has grown used to the surroundings to which they were abducted." *Friedrich II*, 78 F.3d at 1068.

For these reasons, I would find that because Israel is not a "zone of war" as meant by the Convention, Julie has not met her burden of proving that a grave risk of harm exists. As no other exception applies, I would grant Robert's Hague petition, reverse the decision of the district court, and return the children to Israel for [920] a proper custody determination in the Israeli court system.

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of Florida considered, and rejected, a claim that Argentina is a zone of war under the Convention. 220 F.Supp.2d 1347, 1365-66 (M.D.Fla.2002).

[4] I think the district court may also have erred in considering ten-year-old Sam's views. Article 13 of the Convention provides that a court may only consider a child's wishes if the child has attained an age and degree of maturity at which it is appropriate to take account of his views. In *England v. England*, 234 F.3d 268, 272 (5th Cir.2000), the Fifth Circuit held that it was error to consider a thirteen-year-old child's opinions because her maturity had not been proven by a preponderance of the evidence. The proponent of interviewing the child has the burden of proving such maturity. *Id.*

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

ROBERT HECHTER SILVERMAN,
Plaintiff,

v.

JULIE HECHTER SILVERMAN,
Defendant.

May 9, 2002

No. Civ. 00-2274(JRT).

[2002 WL 971808 (D. Minn.)]

* * * *

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING PLAINTIFF'S PETITION

TUNHEIM, District J.

[*1] Plaintiff Robert Hechter Silverman brings this action against defendant Julie Hechter Silverman (now Julie Hechter) pursuant to the Hague Convention, 19 I.L.M. 1501 (1980), and the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601 *et seq.*, alleging that she wrongfully removed their children to or retained them in the United States. Plaintiff contends that the children are habitual residents of Israel within the meaning of Article 3 of the Convention and accordingly seeks an order from the Court directing the prompt return of the children to that country. Plaintiff also seeks an order directing defendant to pay his attorney's fees pursuant to 42 U.S.C. § 11607(b)(3). The Court has jurisdiction to hear this matter under ICARA

Section 4. 42 U.S.C. § 11603(a) (providing concurrent original jurisdiction over actions arising under the Convention in state and federal district courts).

This matter came on for an evidentiary hearing before the Court on March 18, 2002. The Court heard testimony from plaintiff's father, plaintiff and defendant, received affidavit testimony and obtained exhibits. Afterwards, the Court interviewed Samuel Silverman, age ten, in chambers with counsel present. The Court then gave the parties an opportunity to submit closing arguments and amended findings of fact and conclusions of law to the Court. Based on the entire record and proceedings, the testimony at the hearing and arguments of counsel, the Court enters the following findings of facts and conclusions of law.

FINDINGS OF FACT

1. All of the Findings of Fact set forth herein are undisputed or have been proved by a preponderance of the evidence.

2. To the extent that the Court's Conclusions of Law include what may be considered Findings of Fact, they are incorporated herein by reference.

3. Robert was born in South Africa and holds dual citizenship in the United States and Israel.

4. Julie is a dual citizen of the United States and Israel. She holds a degree in sociology from the University of Washington.

5. Robert and Julie met in 1988 while both were working at the Hyatt Hotel in Jerusalem--he as a cook and she as the Assistant Restaurant Manager.

6. In March 1989, Robert and Julie moved to the United States for Robert to pursue his studies. They were married in Seattle, Washington on July 16, 1989. At the time, they resided in Poughkeepsie, New York.

7. Robert and Julie moved to San Francisco, California in 1991 where their oldest son, Samuel, was born on March 2, 1992. Sam is now ten years old.

8. The family lived in San Francisco until April 1993 when they moved to Los Angeles, California. In May 1995, the family moved from Los Angeles to Plymouth, Minnesota where they resided from May 1995 until the end of July 1999.

9. Their second son, Jacob, was born on July 5, 1995 in Minneapolis, Minnesota. He is now 6 years old.

10. In the summer of 1997, Robert and Julie contacted a realtor in Israel to inquire about purchasing property with the intention of relocating to Israel but could not make any commitment until they sold their home in Minnesota.

[*2] 11. In April 1998, the family began their efforts to sell their home. During this time, Julie obtained estimates of the cost to have their property moved to Israel.

12. Their home was sold in January 1999 and the closing took place on March 26, 1999. In March 1999, Robert began applying for Aliyah to Israel, which is the equivalent of immigration. Julie had already made Aliyah in 1987 during her residence in Israel from 1987 to 1989.

13. Julie does not dispute that she wanted to move to Israel and believed that Israel would be the right place to raise children. She also says that she and Robert set the move up to be permanent, but as time drew nearer to the move, she was very torn because she did not think she wanted to stay in the marriage. Robert and Julie had problems in their marriage for a very long time and had sought marital counseling several times.[1]

14. In the months leading up to the move, Robert was working in La Crosse, Wisconsin. According to Julie, she and Robert were separated at the time, although Robert denies this.

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[1] Julie admits she had a relationship with another man. Although it is not clear when the relationship began, Robert learned of the affair in April 1999 after searching temporary internet files and reading Julie's email messages.

15. By July, Julie says she did not want to go to Israel but Robert convinced her to make the move. Julie agreed, stating that she made the move only as a final effort to reconcile her marriage.

16. The family left the United States on July 26, 1999 and arrived in Tel Aviv on July 27, 1999.[2] The household goods had arrived in Israel three months prior to the family's arrival in Israel.

17. Upon their arrival, the family stayed with relatives. They first stayed with Robert's sister in Hod Hosharon, Israel for one month. In late August 1999, the family moved to Raanana, Israel and stayed with Robert's parents for another two months. Raanana is located about 20 kilometers from Tel Aviv. Almost immediately, as early as August 1999, Julie says that she told Robert she wanted to return to the United States.

18. Robert and Julie never purchased a home in Israel, but in October, they entered into a lease to rent an apartment and moved into the apartment in November.

19. In October 1999, Julie flew back to the United States to file for bankruptcy in Minnesota after learning from her father that she and Robert were nearly $100,000 in debt. According to Julie's testimony, she wanted to take the children with her to the United States, but Robert refused to let the children go with her.

20. Upon her return, Julie learned that Robert had obtained a Tzav Ikuv (the equivalent of a restraining order) which prevented her from leaving Israel.[3] On that same day, Robert informed Julie that he knew about her affair and that

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[2] As part of the benefits Robert received for making Aliyah, the family received vouchers to travel to Israel from the Aliyah Center. The voucher meant that their travel would only cost them $100.00 for the entire family.

[3] Julie also learned that Robert had put the children's passports and birth certificates in his father's safe deposit box in the bank.

he had been reading her emails for the last six months. Robert canceled the restraining order on November 3, 1999 after the parties agreed to try again to reconcile their marriage. Nonetheless, Robert testified at his deposition and acknowledged at the hearing that he would not have allowed Julie to leave Israel with the children at any point between October 1999 and June 2000. Julie also testified that for the last nine months of her stay in Israel, Robert engaged in threats, force and coercion during this time which prevented her from leaving Israel.

[*3] 21. As for the children, Sam was enrolled in the Havovel Elementary School and Jacob was enrolled in preschool. They made friends, learned to speak Hebrew and did well in school. Sam participated in extracurricular activities, including chess club, basketball and baseball.

22. In January 2000, Julie and Robert returned to Minnesota to complete the bankruptcy proceeding.[4] Both parties attended the bankruptcy discharge hearing and stated, under oath, that their permanent address was Plymouth Minnesota.[5]

23. In April 2000, the parties filed a joint United States income tax form for 1999 which listed their address as Plymouth, Minnesota. Both parties signed the tax return.

24. In June 2000, Julie left Israel with the two children for a summer trip to the United States and Canada, obtaining Robert's written consent to make the trip. She purchased roundtrip tickets and was scheduled to return to Israel on August 30, 2000. At the airport before their departure, Robert threatened Julie. It was at that moment, Julie says, that she made the decision not to return to Israel.

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[4] The children remained in Israel and stayed with their paternal grandparents, who live across the street from the elementary school.

[5] Both parties also admit they did not disclose a transfer of $9,000.00 to Julie's father from the sale of their home.

25. Julie filed for legal separation from Robert and custody of the two children in Hennepin County District Court on August 10, 2000. Robert was served with the petition in Israel. Robert then filed a motion to dismiss the action, contending that the court lacked jurisdiction to hear the custody issues. Robert also filed a Hague Petition on October 10, 2000 in federal district court seeking return of the children to Israel. On that same day, the state court heard argument on Robert's motion to dismiss for lack of jurisdiction.

26. On October 17, 2000, the state court referee issued an order 1) granting Julie temporary sole legal custody and temporary sole physical custody of the children, 2) granting Robert the right to reasonable visitation, and 3) appointing a guardian ad litem for the children.

27. On May 4, 2001, the state court issued its Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree. In its Findings of Fact, the court found that the parties' move to Israel in August 1999 was temporary and was made in an attempt to restore stability in their marriage. The court further found that Julie and the children would have returned to Minnesota from Israel in October of 1999 but they were prevented from doing so by Robert. The court also relied on the fact that in a bankruptcy petition filed in October 1999, both Robert and Julie signed the joint petition listing their permanent address as 1300 West Medicine Lake Road, Plymouth, Minnesota.

28. While the state proceeding was still pending, Julie moved in the federal court to dismiss the case on abstention grounds. On November 13, 2000, then- Chief Judge Paul A. Magnuson granted her motion, concluding that there is an ongoing state proceeding which implicates important state interests and that Robert has an adequate opportunity to raise the Hague issues in state court. *Silverman v. Silverman*, Civ. No. 00-2274 at 5-7 (PAM/JGL) (Nov. 13, 2000).

[*4] 29. Robert appealed that decision and on October 4, 2001, the Eighth Circuit concluded that abstention was improper and remanded the case for an evidentiary hearing.

Silverman v. Silverman, 267 F.3d 788, 792 (8th Cir.2001), *petition for reh'g en banc* denied. The case was reassigned to this Court and defendant moved shortly thereafter for a jury trial based on the Eighth Circuit opinion. On February 21, 2002, the Court denied defendant's motion. *Silverman v. Silverman*, No. 00-2274, 2002 WL 264932 at * 4 (D.Minn. Feb. 21, 2002).

30. While the state and federal cases were pending in the United States, a rabbinical court in Israel ruled on November 16, 2000 that Israel was the place of residence of Sam and Jacob during the eleven-month period in question and that Julie's failure to return to Israel in August 2000 was prima facie evidence of wrongful retention of the children in violation of the Convention. The decision was upheld on October 30, 2001.

CONCLUSIONS OF LAW

The Hague Convention, to which the United States and Israel are signatories, is an international treaty adopted "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence." Hague Convention, Preamble. Its primary purpose is "to restore the *status quo ante* and to deter parents from crossing international boundaries in search of a more sympathetic court." *Rydder v. Rydder*, 49 F.3d 369, 372 (8th Cir.1995) (citing *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir.1993)). A decision under the Convention is not an adjudication of the merits of any underlying custody claim. Hague Convention, art. 19; 42 U.S.C. § 11601(b)(4).

In order to obtain relief under the Convention, plaintiff must prove by a preponderance of the evidence that his children were "wrongfully removed or retained within the meaning of the Convention." 42 U.S.C. § 11603(e)(1)(A).[6] To

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[6] Because Robert expressly permitted Julie to leave Israel in June 2000, but did not consent to her keeping the children in the United States

demonstrate wrongfulness under Article 3 of the Convention, plaintiff must prove that: "1) defendant [retains] the children from their "habitual residence," and 2) plaintiff was exercising his parental custody rights over the child at the time of the [retention]." *Freier v. Freier*, 969 F.Supp. 436, 439 (E.D.Mich.1996); *Miller v. Miller*, 240 F.3d 392, 398 (4th Cir.2001).

If plaintiff satisfies his burden that the retention of Sam and Jacob was wrongful, the Court must order the return of the children to their habitual residence unless defendant establishes one of the affirmative defenses set forth in Articles 12, 13 or 20 of the Convention. These exceptions are construed narrowly. *Rydder v. Rydder*, 49 F.3d 369, 372 (8th Cir.1995).

In this case, defendant asserts there is a grave risk that returning Sam and Jacob to Israel "would expose them to physical or psychological harm or otherwise place them in an intolerable situation." Hague Convention, art. 13(b). Defendant also contends that Samuel, age 10, objects to being returned to Israel and that he "has attained an age and degree of maturity at which it is appropriate to take account of his views." Hague Convention, art. 13.[7]

I. *Habitual Residence*

[*5] As stated above, plaintiff carries the burden of proving by a preponderance of the evidence that Julie's re-

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permanently, the Court treats this case as one of an alleged "wrongful retention." *Feder v. Evans-Feder*, 63 F.3d 217, 220 n. 4 (3d Cir.1995).

[7] Defendant has also suggested that repatriation to Israel is inappropriate because Sam and Jacob are settled in their new environment. Plaintiff correctly notes that the well-settled exception contained in Article 12 of the Convention is triggered only when a Hague proceeding is commenced after the expiration of one year. In this case, plaintiff filed his Hague petition well within the one year time period and therefore the Article 12 defense does not apply. Nonetheless, as discussed *infra*, the argument that the children are settled in their new environment, while not dispositive under Article 12, can be a relevant factor in the grave risk analysis.

fusal to return Sam and Jacob to Israel constitutes a wrongful retention under the Convention. To satisfy this burden, plaintiff first must establish that the habitual residence of Sam and Jacob at the time of the wrongful retention was Israel. *Miller v. Miller*, 240 F.3d 392, 398 (4th Cir.2001); *Cohen v. Cohen*, 602 N.Y.S.2d 994, 998-99 (Sup.Ct.1993).[8]

The Hague Convention does not specifically define the term "habitual residence." As one court observed, "[t]his has been a matter of deliberate policy, the aim being to leave the notion free from technical rules, which can produce rigidity and inconsistencies as between legal systems." *In re Bates*, No. CA122.89 at 9-10, High Court of Justice, Fam. Div'n Ct. Royal Court of Justice, United Kingdom (1989). Consequently, the determination of one's habitual residence is a fact-based inquiry to be analyzed on a case-by-case basis.

While the intent of the framers of the Convention is for the concept of habitual residence "to remain fluid and fact based," *Levesque v. Levesque*, 816 F.Supp. 662, 665 (D.Kan.1993), several district and circuit courts have given more precise descriptions of "habitual residence." The Eighth Circuit has characterized habitual residence as one's "ordinary residence." *Rydder*, 49 F.3d at 373. Many courts have cited with approval the view articulated by Lord Scarman in *Shah v. Barnet London Borough Council and other appeals*:

> [T]here must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. That is not to say that the propositus intends to stay where he is indefinitely. Indeed his purpose while settled may be for a limited period. Education, business or profes-

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[8] There is no dispute that Robert was exercising his parental rights at the time of the alleged retention in the summer of 2000. Robert has continued to exercise his custody rights by maintaining contact with his children by telephone.

> sion, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode, and there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.

Shah, [1983] 1 Al E.R. 226, 233 (Eng.H.L.) (discussed and adopted in *In re Bates*, at 33).

In one of the most recent decisions on this issue, the Ninth Circuit concluded that "the first step toward acquiring a new habitual residence is forming a settled intention to leave the one left behind." *Mozes v. Mozes*, 239 F.3d 1067, 1075 (9th Cir.2001). The court further held that, although it is the child's habitual residence that is being determined, " 'the intention or purpose which has to be taken into account is that of the person or persons entitled to fix the place of the child's residence.' " *Id.* at 1076 (quoting E.M. Clive, *The Concept of Habitual Residence*, 1997 Jurid. Rev. 137, 144). The Third Circuit has similarly noted that the determination requires consideration of both the child's circumstances and the parents' shared intent. *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir.1995) (explaining that "a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there"). In *Ponath v. Ponath*, 829 F.Supp. 363 (D.Utah 1993), the district court echoed this view, observing that "[a]lthough it is the habitual residence of the child that must be determined, the desires and actions of the parents cannot be ignored." *Id.* at 367. The court continued, "[t]he concept of habitual residence must ... entail some element of voluntariness and purposeful design." *Id.*[9]

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[9] The Court notes that the Eighth Circuit has discussed caselaw from the Sixth Circuit which concludes that parental intent is not relevant

[*6] Evaluating the case at bar under the above standards, the Court determines that the habitual residence of Sam and Jacob never changed from the United States to Israel and therefore, Julie's retention of the children in the United States since June 2000 was not wrongful. With the exception of the eleven months spent in Israel, Sam and Jacob have spent their entire lives in the United States. The evidence also indicates that their time in Israel would have been much shorter nad Julie not been prevented from leaving Israel with the children from October 1999 until June of 2000. From October to November, she was prevented from leaving Israel by virtue of the Tzav Ikuv issued by an Israeli court on an ex parte basis. Although that order was lifted a month later, Robert stated at his deposition and at trial that he would not have allowed his wife to leave Israel with the children in September, October, November or December 1999. He also agreed that he would not have allowed Sam and Jacob to leave Israel in January, February, March, April, May and June of 2000 and that he would have prevented Julie from leaving had he believed that she would return with the children to the United States permanently. Julie also testified that in the last year they were together in Israel, Robert was physically violent towards her and that he threatened to take her children away from him.[10] Al-

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to the habitual residence determination. *Nunez-Escudero*, 58 F.3d at 379 (citing *Fredrich v. Fredrich*, 983 F.2d 1396, 1401-02 (6th Cir.1993) (stating that "to determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions"). In the Court's view, it is difficult, if not impossible, to consider the question of habitual residence without some consideration of the parents' intent. Accordingly, the Court agrees with the Ninth Circuit that parental intent is a relevant factor to be considered along with other factors in the determination of habitual residence. The Court also notes that the Eighth Circuit did not have the benefit of the *Mozes* decision at the time it decided *Nunez*.

[10] Robert admits that on one occasion he and Julie got into a violent argument in the car and at one point he leaned over and opened the passenger side door where Julie was seated. Robert was driving about 40-55 miles an hour at the time. Julie also testified that Robert slammed Julie up

though Robert denies the abuse, the issue is one of witness credibility and, on this point, the Court finds Julie more credible. *Tsarbopoulos v. Tsarbopoulos*, 176 F.Supp.2d. 1045, 1056 (E.D.Wash.2001) (weighing the credibility of the witnesses in determining whether verbal and physical abuse did occur).

In two similar cases, courts have concluded that a coerced residence is not a settled intent to live there. *Ponath*, 829 F.Supp. at 368; *Tsarbopoulos*, 176 F.Supp.2d. 1045. In *Ponath*, petitioner, a citizen of Germany, and respondent, a citizen of the United States, lived in Utah with their two-year- old son. *Id.* at 366. On November 6, 1991, the family traveled to Germany on roundtrip tickets to visit petitioner's family. *Id.* Although they were scheduled to return to the United States a month later, they remained in Germany much longer. *Id.* Two weeks after arriving there, petitioner found employment and by April 1992, he began construction of a house on property near that of his parents. *Id.* As early as February 1992, respondent expressed her desire to return to the United States with the minor child, but petitioner refused to permit her to leave and prevented them from leaving through verbal, emotional and physical abuse. *Id.* The court concluded that the habitual residence of the minor child was the United States. *Id.* at 367. In reaching this conclusion, the court explained:

> [W]hat began as a voluntary visit to petitioner's family in Germany, albeit an extended visit, might be viewed by the court as a change of habitual residence of the minor child but for respondent's intent and desire to return to the United States with the minor child and petitioner's willful obstruction of that purpose. Petitioner's coercion of respondent by means of verbal, emotional and physical abuse re-

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against stone walls in their apartment. Julie also claims Robert verbally threatened her by telling her that he would see her dead before he would see her divorced.

> moved any element of choice and settled purpose which earlier may have been present in the family's decision to visit Germany.... For the court to grant petitioner's motion, and thereby sanction his behavior in forcing continued residence in Germany upon respondent, and through her, the minor child, would be to thwart a principle purpose of the Hague Convention. In the court's view, coerced residence is not habitual residence within the meaning of the Hague Convention.

[*7] *Id.* at 367-68.

In *Tsarbopoulos*, the children were all born in the United States and lived in the United States their entire lives until their father, a Greek citizen and naturalized citizen of the United States, accepted a position with the Goulandris Museum in Athens, Greece. 176 F.Supp.2d at 1051. At the time, Dr. Tsarbopoulos worked at the Schering-Plough Research Institute in New Jersey. Although the family moved to Greece in October 1997 and Dr. Tsarbopoulos signed a two-year contract[11] with the museum, Dr. Tsarbopoulos did not resign from his position with Schering-Plough until January 1998. *Id.* at 1052-53. During that time, he maintained his insurance benefits and represented to the company that he still lived in New Jersey. *Id.* He also maintained various financial arrangements in the United States, including a U.S bank account and U.S. addresses in order to qualify for air mileage. *Id.* at 1052. The facts also revealed a history of verbal and physical abuse by Dr. Tsarbopoulos towards his wife, Kristi Tsarbopoulos. *Id.* at 1050. Witnesses described Dr. Tsarbopoulos as a very domineering husband who controlled the finances and decision-making process and kept his wife socially isolated. *Id.* This conduct continued in Greece and worsened to the point where, in December 1999,

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[11] The contract was renewed in January 1999 for another two-year period, but then was modified in September 1999, extending the contract for a term of indefinite duration. *Id.* at 1052.

Kristi Tsarbopoulos returned to the United States with the three children. *Id.* at 1054.

Petitioner filed a Hague petition, arguing that Greece was the habitual residence of his children because, among other things: 1) the family had lived there for 27 months; 2) the family took all of their clothes and belongings to Greece; 3) he sought and obtained repatriation benefits to aid with the move[12] and 4) his wife had once stated that she had a "dream of living in Greece." The court rejected the father's argument, concluding that Greece was not the habitual residence of the children and that the United States continued to be their habitual residence. *Id.* at 1057. In the court's view, the children did not sufficiently acclimatize to Greece to make it their habitual residence. *Id.* at 1055. The two youngest children had very little socialization outside the family. *Id.* Although Hari, the oldest, attended school and began to learn the Greek language, the court found this evidence insufficient to establish Greece as his habitual residence. *Id.* The court further determined that the Tsarbopolous's did not have a shared intent to abandon the United States as their habitual residence. *Id.* The court based this decision, in part, on the verbal and physical abuse endured by Ms. Tsarbopoulos. *Id.* at 1056. According to the court, "[t]he verbal and physical abuse of one spouse by the other is one of several factors in the Court's determination of the existence of 'shared intent' to make a place the family's 'habitual residence.'" *Id.*[13]

The Court is guided by these decisions and, for the reasons stated above, finds that Julie's residence in Israel from October to June was coerced and that she did not share a

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[12] These benefits are available only to Greek citizens and enabled Dr. Tsarbopoulos to bring goods to Greece without paying taxes. *Id.* at 1055.

[13] The court also relied on: 1) Dr. Tsarbopoulos's control and domination over decisions and finances of the family; 2) his continued ties with the United States; and 3) his misrepresentations to Schering-Plough concerning his residence and his status of employment. *Id.* at 1056-57.

settled intent to make Israel the family's habitual residence. There is also evidence, as there was in *Tsarbopoulos*, which calls into question the permanency of the move to Israel. In the bankruptcy petition filed in October 1999 and when they appeared in court in January 2000, the parties swore under oath that their residence was 1300 Medicine Lake Road, Plymouth Minnesota. Likewise, the couple's 1999 income tax forms, filed in April 2000 and signed by both parties, lists Plymouth, Minnesota as their residence.

[*8] Even though Robert applied for and made Aliyah upon the family's move to Israel, that status does not suggest a conclusion that the family's move was intended to be permanent. The Aliyah process provides substantial financial benefits and given the financial difficulties faced by the parties at the time, it would not be unusual for them to seek help, regardless of whether the parties intended to remain in Israel.

There is evidence that Julie sought employment while in Israel and enrolled the kids in school. Robert also emphasizes statements Julie made in emails to others which, he argues, contradict Julie's claim that she did not want to remain in Israel. In particular, plaintiff relies on the fact that, shortly after arriving in Israel, she told a friend, "I've waited 20 years to make this move." When read in context, however, the Court finds that Julie made the statement in an effort to make the best of the situation before her. The statement, on its own, is thus entitled to little weight. As for the other evidence relied on by Robert, the Court acknowledges that the record is not completely devoid of evidence supporting his position. The same was true in *Tsarbopoulos*. However, it is plaintiff who carries the burden on this issue, and, for the reasons stated above, the Court finds that this burden has not been satisfied. *Cohen*, 602 N.Y.S.2d at 999 (petition must fail because petitioner did not satisfy one of the requirements for relief under the Convention). Accordingly, for all the foregoing reasons, the Court finds that the habitual residence of Sam and Jacob is the United States and

therefore, Julie's retention of the children in the United States is not wrongful.

II. *Affirmative Defenses*

A. *Grave Risk of Harm*

Even if the Court had determined that Israel was the habitual residence of Sam and Jacob, the Court finds, in the alternative, that their return to Israel would pose a grave risk of physical harm or otherwise place them in an intolerable situation. Article 13(b) of the Convention provides that:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that ....
>
> (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

Hague Convention, art. 13, 19 I.L.M. at 1502. As with the concept of habitual residence, many courts have interpreted the scope of this exception. In *Thomson v. Thomson*, the Supreme Court of Canada held that "the physical or psychological harm contemplated by the first clause of art. 13(b) is harm to a degree that also amounts to an intolerable situation." 119 D.L.R.4th 253, 286 (Can.1994). A British court has concluded that the harm required to trigger the grave risk defense is "something greater than would normally be expected on taking a child away from one parent and passing him to another." *In re A.*, 1 F.L.R. 365, 372 (Eng.C.A.1988). The Eighth Circuit has cited to these decisions with approval. *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 377 (8th Cir.1995) ("We should give considerable weight to these well-reasoned opinions of other Convention signatories."). The court in *Nunez* further emphasized that "[t]he Article 13b inquiry does not include an adjudication of the underlying custody dispute." *Id.* According to the Eighth Circuit, "[i]t is not relevant to this Convention exception who is the

better parent in the long run, or whether [respondent] had good reason to leave her home in Mexico and terminate her marriage to [petitioner], or whether [respondent] will suffer if the child she abducted is returned to Mexico." *Id.* What is relevant are the circumstances and environment in which the child will reside upon his or her return. In other words, "the Article 13b inquiry must encompass some evaluation of the people and circumstances awaiting that child in the country of his habitual residence."[14] *Id.* at 378. Under the implementing legislation for the Convention, a party opposing return based on an Article 13(b) exception must establish the exception by clear and convincing evidence. 42 U.S.C. § 11603(e)(2)(A).

[***9**] Upon review of the evidence presented in the case, the Court finds that returning Sam and Jacob to Israel for determination of the custody issue would expose them to a grave risk of physical harm and place them in an intolerable situation. Israel is currently in a state of turmoil. Although, as plaintiff testified, Israel has always been a country at conflict to some extent, it is clear that the intifada has escalated dramatically in recent months. At the hearing, defendant presented evidence of the violence occurring in the region. It is undisputed that on March 16, 2002, a Palestinian gunman opened fire and killed two people, including a 17-year-old student, in the City of Kfar Saba. Each and every witness called to testify acknowledged that Kfar Saba is less than

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[14] The Sixth Circuit has interpreted these standards to mean that a grave risk of harm under the Convention can exist in only two situations:

> First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute-- e.g. returning the child to a zone of war, famine or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.

Friedrich v. Friedrich, 78 F.3d 1060, 1069 (6th Cir.1996).

five miles from plaintiff's home in Raanana. Witnesses also acknowledged that another Palestinian bombing occurred in Netanya, a city only 15 miles from Raanana.

Since the hearing on March 18, the violence in the region has steadily worsened. On March 22, 2002, a Palestinian suicide bomber killed three Israelis and wounded 40 more in Jerusalem. *See* "Jerusalem Bomber Kills 3 and Shakes U.S. Peace Effort," N.Y. Times at A1, Mar. 22, 2002. On March 28, 2002, another Palestinian suicide bomber blew himself up in a crowded hotel dining room in Netanya as more than 200 people gathered for the Passover holiday meal. *See* "Bomb Kills At Least 19 in Israel as Arabs Open Beirut Meeting," N.Y. Times at A1, Mar. 28, 2002. The incident, "kill[ed] at least 19 and wounded more than a 100 others, many of them children." *Id.* On April 1, 2002, another suicide bomber detonated himself in a popular café in Haifa, a town in Northern Israel. *See* "Sharon Says Israel is in a War After Suicide Bombing Kills 14; More Tanks Move in West Bank," N.Y. Times at A1, Apr. 1, 2002. The blast killed 14, wounded 40 others and was described as "among the deadliest of the 18-month conflict." *Id.* On April 10, 2002, a bomb exploded on a commuter bus near Haifa, killing at least five people and injuring 20 others. *See* "Ambush Kills 13 Soldiers: *More dead today as bus blast kills at least 5 near Haifa*," Minneapolis Star Tribune at A1, Apr. 10, 2002. On April 12, 2002, a female suicide bomber blew herself up at a bus stop in Jerusalem's crowded outdoor market, killing six people and wounding many others. *See* "Bomb Rips at Peace Effort," Minneapolis Star Tribune at A1, Apr. 13, 2002. The escalating violence prompted the State Department to issue travel warnings, telling Americans not to travel to Israel, the West Bank or Gaza and advising American residents in Jerusalem to leave the city. *See* "State Department issues new travel warning for Americans in Israel," 2002 WL 3319550, NBC News: Today, Apr. 3, 2002. Most recently, on May 7, 2002, 15 people were killed in a suicide bombing of a gambling club in Rishon le Zion, Israel, located 10 miles south of Tel Aviv. *See* "15 Killed by Suicide Bomber; Sharon Cuts Short U.S. Visit After a Meeting with Bush," N.Y. Times at A1, A14, May 8,

2002. The Court takes judicial notice of these events in consideration of this issue.[15]

[*10] There is evidence in the record, particularly from plaintiff's father, Maurice Silverman, who lives in Raanana and works in Tel Aviv, that, despite the events, schools and business have not closed. Plaintiff contends that the facts of this case are indistinguishable from those in *Freir v. Freier*, 969 F.Supp. 436 (E.D.Mich.1996), in which the court held that unrest in Israel was insufficient to establish the grave risk defense. *Id.* at 443. The Court does not agree. Significant differences exist between the violence occurring at the time *Freir* was decided and the violence occurring in Israel today. Unlike before, the violence has permeated areas that were previously unaffected by the conflict. Furthermore, the type of violence, through suicide bombings, has placed civilians, including children, at much greater risk. The level and intensity of violence occurring in Israel today thus goes well beyond "some unrest" described in *Freier*. In the Court's view, the current situation in Israel meets the "zone of war" standard contemplated by the Sixth Circuit in *Friedrich*.

The Court also takes account of the fact that Sam and Jacob are settled in their new environment and that Sam objects to returning to Israel. The Second Circuit has held that a court may consider the degree to which a child has settled in his or her new environment as well as that child's views in deciding whether the grave risk defense has been established under Article 13(b). *Blondin v. Dubois*, 238 F.3d 153, 163-68 (2d Cir.2001). Sam and Jacob have lived in the United States for nearly two years, a time period longer than that spent in Israel. In this time, Sam and Jacob have

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[15] According to Federal Rule of Evidence 201, "[a] court may take judicial notice, whether requested or not," and such notice "may be taken at any stage of the proceeding." Fed.R.Evid. 201(c) & (f). The facts noted above are appropriate for judicial notice as they are facts not subject to reasonable dispute and are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed.R.Evid. 201(b).

adjusted extremely well to their environment, as evidenced by letters submitted by teachers of the Touchstone Community School in Worcester, Massachusetts, where they now live, and Rabbi Bernstein of the Temple Sinai.

Additionally, Sam objects to returning to Israel, in part because of the violence in the region. *Blondin*, 238 F.3d at 166 (stating that "if a child's testimony is germane to the question of whether a grave risk of harm exists upon repatriation, a court may take it into account"). The Court finds that Samuel is mature enough and old enough to take consideration of his views, particularly where, as here, the Court is taking his views into account as a factor, and not a conclusive determination of whether to deny repatriation. *Id.* ("[I]t stands to reason that the standard for considering a child's testimony *as one part of a broader analysis* under Article 13(b) would not be as strict as the standard for relying *solely* on a child's objection to deny repatriation under Article 13.") (emphasis in original).

The evidence presented at the hearing reveal that Sam is a very bright and intelligent individual. He is a gifted child, which means he is in a class that is on par with his academics. He reads newspapers each day to follow events in Israel. The Court is particularly impressed by his behavior in learning of the upcoming legal proceedings and his desire to express his views in a letter and have them considered by the Court. The Court witnessed Sam's maturity firsthand in discussions with him in chambers after the hearing. In both the Court's private discussions with Sam and in the presence of counsel, the Court was impressed by the level of maturity exhibited by Sam. It was evident that he understood the purpose and significance of these proceedings. Of course, while it is not possible to completely eliminate the possibility of influence by one parent, the Court saw no evidence of such influence in either the events leading up to Sam writing the letter, the contents of the letter itself, or in discussions with Sam. Finally, the Court finds that Sam, at age 10, is sufficiently old enough to have his views considered. *Blondin*,

238 F.3d at 167 (eight-year-old girl old enough to consider her views on returning to France).

[*11] Thus, for all the foregoing reasons, the Court makes the alternative holding that defendant has established the grave risk defense by clear and convincing evidence.

Both parties are fully capable of being excellent parents for Sam and Jacob. Regardless of whether there are additional legal proceedings in this case, the Court strongly encourages the parties to work out an arrangement which allows both Robert and Julie to be parents who are very much involved in their children's lives.

ORDER

Based upon the foregoing, the submissions of the parties, the arguments of counsel and the entire file and proceedings herein, IT IS HEREBY ORDERED that plaintiff's petition for return of the child to plaintiff [Docket No. 1] is DENIED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

ROBERT HECHTER SILVERMAN,
Petitioner,

v.

JULIE HECHTER SILVERMAN,
Respondent.

August 28, 2003

No. Civ. 00-2274(JRT).

[2003 WL 22076555 (D. Minn.)]

* * * *

ORDER FOR RETURN

TUNHEIM, J.

BACKGROUND[1]

[***1**] Petitioner Robert Hechter Silverman ("Robert"), a resident of Israel, petitioned this Court for return of the parties' two minor children ("Samuel and Jacob" or "the children") pursuant to the Hague Convention 19 I.L.M. 1501 (1980) as implemented by the United Sates in the International Child Abduction Remedies Act, 42 U.S.C. sections 11601-11610. He brought the petition around the same time that a Minnesota State Court granted temporary custody of the children to respondent Julie Hechter Silverman (now

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[1] This case has a complicated and extensive history, and the Court recites only the essential facts in this brief order.

Julie Hechter), a resident of the United States. After an evidentiary hearing, this Court denied the petition for return. A panel of the Eighth Circuit Court of Appeals affirmed. Petitioner's request for rehearing *en banc* was granted, and the Court, sitting *en banc*, determined that Israel is the children's place of habitual residence. The Eighth Circuit remanded for an order that the children be returned to Israel for a custody determination in the Israeli Courts. Julie has petitioned the United States Supreme Court for a stay of the return, pending that Court's consideration of her petition for *certiorari*.

The Eighth Circuit's *en banc* opinion did not contemplate or address the practicalities of the return. To that end, both parties have requested additional interim relief from this Court, and respondent has provided the Court with a draft order. The Court held a telephone conference shortly after the Eighth Circuit issued the mandate, and both parties have communicated with the Court via additional written correspondence. This Order implements the *en banc* Court's mandate, and addresses the practicalities of the return left open by the Eighth Circuit.

PARTIES' REQUESTS

Respondent requests that this Court delay implementation of this Order until the United States Supreme Court has acted on her petition for certiorari, or at least until the Circuit Justice has had an opportunity to act on her petition for a stay. She also requests that the Court grant her necessary protections from criminal prosecution in Israel, so that she may have unfettered access to the Israeli Courts to allow those courts to make a fair custody determination, consistent with the Hague Convention and the best interests of the children. Respondent further requests that the Court not order a transfer of custody to petitioner pending a custody determination in Israeli Courts. Finally, respondent

requests that the Court make clear in this Order that the Court is not making any custody determination.[2]

Petitioner, for his part, makes various requests. He requests that the Court immediately transfer custody to him, and that the Court order that he has the exclusive right to the physical and legal custody of the children. Petitioner requests that the Court order respondent to turn over the children's passports. In addition, petitioner requests that the United States Marshal Service instantly pick up the children and hold them in custody until he arrives to return them to Israel.

I. *Time for Return*

[***2**] Petitioner requests that the children be returned almost instantly. Respondent requests that the Court stay its order until the Supreme Court acts on the petition for certiorari,[3] or at least until the Circuit Justice can act on her request for a stay.[4] The Hague convention provides that the children be returned promptly. The Court finds that it is reasonable, and in keeping with the Hague Convention and the Eighth Circuit's mandate, to make its Order of Return effective upon the Circuit Justice's denial of the motion for a stay.[5] The Court also finds it reasonable, and consistent with the mandate, to allow respondent a short period of time in which to make travel arrangements and to return with the children should the request for a stay be denied.

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[2] The Court considers these to be respondent's primary requests. Respondent also objects to the majority of petitioner's requests, and requests that the Court make additional items "clear" in the Order.

[3] To the best of this Court's knowledge, the petition for certiorari is yet to be filed.

[4] Respondent's counsel has represented to the Court that the request for the stay will be filed today with the Circuit Justice.

[5] Of course, should the Circuit Justice grant the motion for a stay, this Order will not take effect. The Court would vacate this Order under such a circumstance.

The Court understands petitioner's desire that the Court act promptly so that the custody determination may be finalized. However, the children have been in the United States for several years, and a delay of less than a month will not unduly prejudice petitioner or harm the children, and is necessary in this case. The Court anticipates that the Circuit Justice will act promptly on respondent's request and that any delay on that basis will be minimal. It would be foolish, not to mention unnecessarily traumatic for the children and expensive and time consuming for the parents, to order the children returned, and then, should the Circuit Justice grant the stay, order them brought back to the United States. The Court therefore conditions this Order on the denial of the stay.

The Court also will allow respondent up to twenty days, after the Circuit Justice issues a ruling, to return the children to Israel. Twenty days allows for a prompt return of the children, and gives respondent a reasonable amount of time to make necessary travel and other arrangements.[6] This amount of time is in keeping with other orders for return.[7] *See, e.g., Antunez-Fernandes v. Connors-Fernandes*, 259 F.Supp.2d 800 (N. D.Iowa 2003) (allowing approximately one month for return of child to France); *Belay v. Getachew*, __ F.Supp.2d __, 2003 WL 21710257 (D.Md. July 8, 2003) (allowing thirty days to return child to Sweden).

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[6] It has come to the Court's attention that the children's passports have expired. Respondent's counsel represents that respondent is attempting to secure passports for the boys. By this Order, respondent is required to apply for the passports using the expedited service to ensure that the passports are received within two weeks.

[7] The Court notes, and regrets, that due to the timing of this case, the children might miss the beginning of the school year. The Court trusts that both parties will act in the best interest of the children to work to make the arrangements for return that will be minimally disruptive to the children's education.

II. *Undertakings*

Courts in contracting countries have the authority to order the parties to accept "undertakings" to "ameliorate any short-term harm to the child[ren]." *Feder v. Evans-Feder*, 63 F.3d 217 (3rd Cir.1995) (citing *Thomson v. Thomson*, 119 D.L.R.4th 253 (Can.Sup.1994)). "Undertakings" are essentially compromises to which the petitioning parent agrees; for example, a petitioning parent might undertake to pay for the return trip for the respondent parent and child.

In this case, Julie requests that Robert undertake to refrain from any action to enforce, or cause to be enforced, threatened actions of criminal charges and ex-parte restraining orders (Tkav Ikuv). Such criminal charges and restraining orders would clearly interfere with her access to the Israeli Courts for a full and fair custody determination. Any such interference would be contrary to the Hague Convention, and would emphatically not be in the best interests of the children.

[***3**] While the Court may have the authority to condition return of the children on Robert agreeing to such an undertaking, there is no need for such authority here, because Robert has agreed not to take any actions that would cause Julie to be prosecuted.[8] This Order therefore incorporates and reflects that agreement.

III. *Custody Status Quo*

There can be no dispute, given the language of the Hague Convention, that this Court has no authority to make a custody determination. In fact, both parties have made that argument to the Court. Nonetheless, petitioner requests that the Court grant full physical and legal custody to

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[8] Counsel for petitioner suggests that because petitioner has not taken any action to prosecute respondent for the past three years, he obviously is not interested in pursuing such an action. Such a suggestion might offer respondent little comfort, however, since she has not returned to Israel in that time.

him, pending the outcome of the Israeli custody determination. The Court finds no authority-either in the language of the Hague convention, or in the Eighth Circuit's opinion-for this Court to issue such an Order.

Practically, however, someone must have custody of the children pending a final custody determination. The Court therefore turns to the only custody finding that has been made, that of the Minnesota State Court. That Court found that it was in the best interest of the children to be in Julie's custody. The Court therefore orders that the custody arrangement ordered by the Minnesota State Court be continued until an Israeli Court orders otherwise.[9]

IV. *Additional Considerations*

It is by no means a foregone conclusion that the Israeli Courts will grant custody to Robert. Similarly, the Israeli Court might determine that it is in the children's best interests to return to their school in Boston pending the custody determination. Nothing in this Order prevents the children from being returned to the United States, should an Israeli Court of competent jurisdiction so order, or so allow.

ORDER

IT IS HEREBY ORDERED that:

1. Julie Hechter shall immediately apply for passports for Samuel and Jacob, using the expedited process;

2. Pending the effective date of this ORDER, Julie Hechter shall not remove the children from the District of Massachusetts unless she first receives written permission from this Court. Written requests for such permission shall be copied to petitioner and his counsel.

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[9] Should Julie refuse to comply with this Order of Return, the Court will issue a separate order authorizing Robert to return the children to Israel. Nothing in this Order, however, allows the United States Marshal Service authorization to arrest, or to pick up and hold, the children. Such an outrageous request would be unnecessarily traumatic to the children.

THE FOLLOWING PORTION OF THIS ORDER (paragraphs 3 through 7) BECOMES EFFECTIVE IF AND WHEN THE UNITED STATES SUPREME COURT DENIES RESPONDENT'S APPLICATION FOR A STAY OF THESE PROCEEDINGS:

3. Samuel and Jacob shall be RETURNED to Israel, in the company of their mother, within 20 days of the Supreme Court Circuit Justice's denial of a stay of these proceedings;

4. As soon as arrangements for the return are made, Julie Hechter shall inform the Court and respondent, in writing, of the date and flight information of the journey, and shall inform the Court and respondent of any subsequent modifications of the schedule;

5. Should Julie Hechter be unwilling to accompany the children in keeping with this order, the Court will issue a separate order providing that Samuel and Jacob be returned to Israel accompanied by Robert Silverman;

[*4] 6. Robert Silverman shall not interfere with Julie Hechter's access to a full and fair custody hearing in the Israeli Courts. For that reason, and per the undertaking described above, Robert Silverman shall not initiate or attempt to influence any criminal proceedings against Julie Hechter, or take any other actions which limit Julie Hechter's access to the Israeli Courts, or to any Court making a lawful custody determination;

7. The present physical custody arrangement shall be MAINTAINED until the Israeli Courts can make a final custody determination. The parties shall cooperate to ensure each Robert Silverman has reasonable visitation with the children.

APPENDIX E

1. The International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601–11610, provides, in pertinent part:

§ 11601 Findings and declarations

(a) Findings

The Congress makes the following findings:

. . . . .

(4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.

(b) Declarations

The Congress makes the following declarations:

(1) It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States.

. . . . .

(3) In enacting this chapter the Congress recognizes—

(A) the international character of the Convention; and

(B) the need for uniform international interpretation of the Convention.

. . . . .

§ 11603 Judicial remedies

(a) Jurisdiction of courts

The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) Petitions

Any person seeking to initiate judicial proceedings under the Convention for the return of a child . . . may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

. . . . .

(d) Determination of case

The court in which an action is brought under subsection (b) shall decide the case in accordance with the Convention.

(e) Burdens of proof

(1) A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence—

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention[.]

. . . . .

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing—

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

. . . . .

(g) Full faith and credit

Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this chapter.

2. The Hague Convention on the Civil Aspects of International Child Abduction, T.I.A.S. No. 11,670, 19 I.L.M. 1501, provides in pertinent part:

APPENDIX F

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are—

(a) to secure the prompt return of children wrongfully removed to or retained in any contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

. . . . .

Article 3

The removal or the retention of a child is to be considered wrongful where—

(a) it is in breach of rights of custody attributed to a person . . . under the law of the State in which the child was habitually resident immediately before the removal or retention[.]

. . . . .

CHAPTER III – RETURN OF CHILDREN

. . . . .

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

. . . . .

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

. . . . .

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person . . . which opposes its return establishes that—

. . . . .

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.